Supreme Court, U.S.
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No. ——

IN THE
SUPREME COURT OF THE UNITED STATES

Larry M. Fessler and Suzanne D. Fessler,
Petitioners,

v.

Bayshore Realty Inc., an Oregon corporation,
Cory Comstock, John C. Jensen, and David O. Quinn,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" rationale of ***Reves v. Ernst & Young,*** 507 U.S. 170 (1993) requires clarification?

Whether the effect of ***Reves v. Ernst & Young,*** 507 U.S. 170 (1993) seemingly undermines this Court's decision in ***Salinas v. United States***, 522 U.S. 52 (1997), rendering the RICO conspiracy statute superfluous?

PARTIES TO THE PROCEEDING

Petitioners

Larry M. Fessler and Suzuanne D. Fessler. Petitioners are individuals and have no corporate affiliation.

Respondents

Bayshore Realty Inc., an Oregon corporation; Cory Comstock, John C. Jensen, and David O. Quinn

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OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is not reported. A copy of the Memorandum Opinion is included in Appendix A at 1a. The Opinion and Order of the United States District Court for the District of Oregon is not published. A copy of the Opinion and Order is included in Appendix B at 9a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Memorandum Opinion on 17 March 2000. This Petition for Writ of Certiorari is filed within 90 days of the issuance of the Memorandum Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

Federal Racketeer Influenced and Corrupt Organizations Act of 1970
18 U.S.C. §1962(c)

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Federal Racketeer Influenced and Corrupt Organizations Act of 1970
18 U.S.C. §1962(d)

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

Petitioners purchased a beach front home in the exclusive Bayshore subdivision of Waldport, Oregon from Respondent Jensen through a real estate listing agreement with Respondent Bayshore Realty Inc. Bayshore is owned and managed by Respondent Comstock.[1] Comstock referred Petitioners to Respondent Quinn to perform the real estate inspection in October, 1992. In January, 1993, Petitioners acquired possession of the premises. Subsequently, Petitioners discovered substantial dry rot and significant forms of concealed property damage.

Petitioners contend that Respondents' collaboration to conceal and omission to disclose property damage constituted materially factual misrepresentations. In addition, Petitioners alleged that the pre-existing commercial relationship between Respondents Bayshore, Comstock, and Quinn served to facilitate mutually beneficial objectives of buying and selling real properties and providing inspection services, each generating commissions and fees. This relationship, Petitioners contend, exemplified a successful ***modus operandi*** to ensnare the unsuspecting, resulting with Respondents profiting and victims injured. Equally significant, Bayshore Respondents affirmatively represented Quinn as the sole real estate inspector in a 50 mile radius of Waldport, assuring an exclusive market for the rendition of his services.

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[1] Bayshore Realty Inc., Comstock, and Jensen comprise the Bayshore Respondents.

In September, 1993, Petitioners initiated an Oregon state court proceeding against Respondents, advancing a fraud claim against the Bayshore Respondents. Negligence and contract breach claims were filed against Quinn. In August, 1994, that court granted Bayshore Respondents' summary judgment motion. The claims against Quinn were set for trial. The resulting appeal as to the Bayshore Respondents was dismissed, though the appeal from entry of judgment in favor of Quinn was subsequently reversed. *See* ***Fessler v. Quinn***, 143 Or.App. 397, 399 (1996).

In October, 1996, Petitioners instituted action against Respondents for contravening the Racketeer Influenced and Corrupt Organizations Act of 1970, Title 18 U.S.C. Section 1961 ["RICO"]. The complaint alleged Petitioners were injured in their property by reason of Respondents' racketeering activities arising from their commercial affiliation in connection with concealing and omitting disclosure of the property damage to Petitioners. Petitioners asserted that Respondents' ***modus operandi*** was designed, implemented, and executed by individual Respondents' employment of Bayshore Realty Inc. as a RICO enterprise. Petitioners' RICO claims embraced contravention of RICO Section 1962(a) and 1962(c), and a RICO Section 1962(d) conspiracy claim.

Petitioners amended the complaint to substantiate the RICO pattern of racketeering activity component and amplify the nexus between that activity and the function of the RICO enterprise. The amendment included evidentiary facts demonstrating the existence of similar victims that succumbed to Respondents' course of conduct, thereby further corroborating the "continuity" and "relatedness" requisites.

Respondents filed summary judgment motions pursuant to Federal Rule of Civil Procedure 56. Those grounds included Petitioners' inability to establish a RICO Section 1962(a) "racketeering investment injury," a RICO enterprise, a RICO pattern of racketeering activity, and viable RICO substantive fraud and conspiracy claims. Bayshore Respondents asserted res judicata as an alternative basis for summary judgment.

After further briefing ordered by the District Court addressing the RICO enterprise issue in the restricted context of ***Chang v. Chen***, 80 F.3d 1293 (9th Cir. 1996), Respondents' summary judgment motions were granted. Inexplicably, the District Court found the Bayshore Respondents were entitled to *res judicata* effect of the prior state court judgment, but refused to accord similar application to Respondent Quinn. App. B at 25a-27a. The District Court entered summary judgment on October 2, 1998 and a subsequent judgment of dismissal entered on April 23, 1999.

Petitioners filed a timely appeal with the Court of Appeals for the Ninth Circuit. On March 17, 2000, the Court of Appeals affirmed the District Court's judgment. The Panel held that Petitioners were precluded from advancing the RICO claims against the Bayshore Respondents based on *res judicata*. The crux of the Panel's ruling sustaining judgment as to Quinn revolved upon an amorphous construction of ***Reves v. Ernst & Young***, 507 U.S. 170 (1993) that Petitioners failed to satisfy the "conducted" or "participated in" an enterprise's affairs. The failure to establish a RICO Section 1962(c) substantive fraud violation invalidated Petitioner's RICO conspiracy claim. This result is diametrically inapposite of this Court's holding in ***Salinas v. United States***, 522 U.S. 52 (1997). App. A at 7a-8a.

ARGUMENT FOR GRANTING WRIT

Reves has received varying inconsistent interpretations producing inexplicable results. Intended to immunize professional defendants from RICO exposure, federal courts construe ***Reves*** to apply, or not apply, based on the particular facts alleged, or evidence presented. Defendants occupying peripheral capacities frequently invoke ***Reves*** to successfully extricate themselves from RICO liability. Though ***Reves*** originally contemplated delimiting the reach of RICO Section 1962(c) in the primary liability context, federal courts have erroneously applied ***Reves*** to RICO Section 1962(d) conspiracy claims. This misapplication is inconsistent with ***Salinas***.

The myriad of factual contexts that arise where ***Reves*** is employed to summarily defeat a RICO Section 1962(c) claim is generated both divisiveness within the federal circuits and tension between the proper construction of ***Reves*** and ***Salinas***. The divisiveness and judicial tension is exacerbated by the absence of clearly delineated demarcations.

Congress has given courts confronted with uncertain meaning the RICO "Liberal Construction" Clause, which directs that the "provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961. This Court has relied upon this express admonition to construe RICO provisions broadly, ***see Sedima, S.P.R.L. v. Imrex Co.***, 473 U.S. 479, 497-498 (1985), and in this instance, the "Liberal Construction" Clause plays its intended part, directing this Court to recognize the more inclusive definition of the word "conduct," free of any restricting element of direction or control.

The need for judicial guidance from this Court is acute. The issues addressed herein, the application of ***Reves***, the absence of clear parameters governing its application, and the threat of seemingly undermining the interpretation and application of ***Salinas*** by ***Reves*** are of initial impression for this Court and of exceptional national importance and application.

ARGUMENT 1

The "conduct or participation, directly or indirectly, in the conduct of such enterprise's affairs" rational of *Reves v. Ernst & Young*, requires clarification

The present application of ***Reves*** exacerbates the Congressional objective of engendering consistently uniform interpretation of RICO. The District Court did not address ***Reves*** in analyzing the factual juxtaposition of Respondent Quinn to the RICO enterprise; rather the District Court reviewed the issue under ***United States v. Turkette***, 452 U.S. 576, 583 (1981) and ***Chang v. Chen***, 80 F.3d 1293 (9th Cir. 1996). The Court of Appeals sustained the District Court summary judgment[2] finding of the absence of evidence that Respondent Quinn "conducted" or "participated in" an enterprise's affairs, citing ***Reves*** and ***Baumer v. Pachl***, 8 F.3d 1341, 1344 (9th Cir. 1993). The interpretation of ***Reves*** inexplicably ignored the practical aspects of its application in

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[2] In ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 255 (1986).

the particular factual context. This is an example of how the federal courts have misconstrued the "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" requisite.

This Court struggled with the use of the terms "conduct" and "participate" in formulating its ruling in ***Reves***. The result has severely exacerbated efforts by the federal courts to construe those terms to advance the RICO Liberal Construction Clause. ***Reves*** obfuscates "conduct" by quoting it only in the verb form in its statement of the context for divining meaning that similarly must fit the noun usage. This Court attained this conclusion that "in the context of the phrase 'to conduct . . . [an] enterprise's affairs,' the word indicates a some degree of direction."

The context is not so restricted, and several features of RICO Section 1962(c) support a more inclusive construction of "conduct." The term, when employed as a noun, is defined by this Court's selected dictionary as, for example, "carrying forward" or "carrying out," Webster's Third New International Dictionary, phrases without any implication of direction or control. The suggestion of control is diminished further by the fact that RICO Section 1962(c) embraces not just those "employed by" an enterprise, but those merely "associated with" it.

Associates are proscribed not merely from participating directly in such unlawful conduct, but even from indirect participation in the conduct of an enterprise's affairs in such a manner. The breadth of this proscription renders this Court's reading of "conduct" rather distended and awkward. It is pragmatically difficult to envision how the "operation or management" test would leave the statute with the capacity to reach the indirect participation of someone

merely associated with an enterprise. This contextual examination illustrates "conduct" to have an extensive reach, unrestricted by any requisite to establish that the activity includes an element of direction. The complete context is sufficient to seriously importune this Court's conviction that the more stringent interpretation of the term "conduct" is clearly the one intended.

The evidence Petitioners presented in opposing the summary judgment motion demonstrated Respondent Quinn's "conduct" and "participation" in the broad sense. The evidence of the commercial affiliation between the required demand for inspection and the active participatory role of the Bayshore Respondents to provide the opportunity to effect such inspections, the scheme to defraud could not be accomplished. Each of the Respondents played an integral function here. No single Respondent could achieve a result without the co-Respondents' participation.

Clarification of ***Reves*** is necessary to resolve the inconsistent interpretations of "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" rationale. Permitting the decision of this Panel to stand on its reasoning only serves to further exacerbate the increasing inconsistency between the federal courts' interpretation of ***Reves***.

ARGUMENT 2

The construction of *Reves v. Ernst & Young* by the federal courts requires uniformity and clarification

Reves is a stringently construed rule essentially created to benefit professionals who find themselves embroiled in

RICO litigation based on the mere rendition of perfunctory services, as long as they do not "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." In fact, ***Reves*** has generated intense debate and increased judicial activity that otherwise would have been silenced. *See* G. Robert Blakey and Kevin P. Roddy, *Reflections on **Reves v. Ernst & Young**: Its Meaning and Impact On Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO,* 33 Am. Crim. L. Rev. 1345 (Special Ed. 1996).

Federal courts have increasingly construed ***Reves*** to apply, or not apply, in a myriad of differing factual contexts. Disposition of most of those RICO actions where Reves is invoked is achieved on a motion to dismiss for failure to state a claim, and the federal courts have exhibited a growing eagerness to jettison such actions through the federal summary judgment instrument. *See **Bachman v. Bear, Stearns & Co., Inc.***, 178 F.3d 930, 932-933 (7th Cir. 1999) (Bear Stearns did not exercise, or agree to exercise, some measure of control over the corporations; it was merely a hireling as shown by fact that it only received its normal fee for determining a client's fair market value); ***Goren v. New Visions Int'l, Inc.***, 156 F.3d 721, 727-728 (7th Cir. 1998) (outsider's performance of services for illegal corporate enterprise is not enough to incur liability under ***Reves***, even if outsider's role is critical to success of fraudulent scheme); ***Klein v. Boyd,*** Nos. 97-1143, 97-1261, 1998 U.S. App. LEXIS 4121 (3rd Cir., Mar 9, 1998) (law firm that concealed information from documents it knew would be given to investors by its client did not participate in operation or management of client partnership); ***Webster v. Omnitrition Int'l, Inc.***, 79 F.3d 776, 789 (9th Cir. 1996) (attorney whose role as officer of corporation was purely ministerial in nature not liable for making statements allegedly promoting pyramid scheme);

Baumer v. Pachl, 8 F.3d 1341 (9th Cir. 1993) (attorney's involvement in alleged limited partnership fraud scheme was too limited and sporadic to satisfy ***Reves***); ***Stone v. Kirk***, 8 F.3d 1079, 1091-1092 (6th Cir. 1993) (salesman of joint venture interests who did not play any part in directing venture's affairs did not sufficiently participate in operation or management of enterprise that he could not be held liable for violating anti fraud provisions of federal securities laws in connection with his sale of interests); ***Madanes v. Madanes***, 981 F. Supp. 241, 256-257 (S.D.N.Y. 1997) (allegations that attorney knowingly concealed fraudulent activities of enterprise and recommended certain courses of fraudulent behavior are insufficient to establish RICO Section 1962(c) liability); ***Bowdin Constr. v. Rhode Island Hosp. Nat'l Bank***, 869 F. Supp. 1004, 1009 (D. Mass. 1994) (dismissing claims under ***Reves*** against law firms which, with full knowledge of fraud, counseled their clients to continue to participate in the fraudulent transactions and to conceal them from detection by their victims); ***Nolte v. Pearson***, 994 F.2d 1311, 1317 (8th Cir. 1993) (applying ***Reves*** to affirm directed verdict in favor of defendant law firm); ***University of Maryland v. Peat, Marwick, Main***, 996 F.2d 1534, 1538-1540 (3rd Cir. 1993) (affirming dismissal of RICO count against accounting firm despite egregious misconduct by the firm; merely performing materially deficient financial services for an insurance company does not amount to directing the insurance company's affairs); and, ***Azrielli v. Cohen Law Offices***, 21 F.3d 512, 521 (2d Cir. 1994) (individual who merely acted as an attorney for the other defendants, who had no role in the conception, creation or execution of the alleged flip/ assignment, could not be liable under ***Reves***).

A developing body of positive federal case law refusing to apply ***Reves*** in traditional professional liability based RICO actions signals an increasing revulsion and

recognized antipathy towards its perceived blanket immunization policy. *See* ***Handeem v. Lemaire***, 112 F.3d 1339, 1349 (8th Cir. 1997) (refusing to apply ***Reves***, stating "[a]n attorney's license is not an invitation to engage in racketeering, and a lawyer no less than anyone else is bound by generally applicable legislative enactments." The court warned that it would "not shrink from finding an attorney liable when he crosses the line between the traditional rendition of legal services and active participation in directing the enterprise. The polestar is the activity in question, not the defendant's status"); ***Napoli v. United States***, 32 F.3d 31, 36 (2d Cir. 1994) (attorneys who were "of counsel" to the Eisen firm were not merely providing peripheral advice, but participated in core activities that constituted the affairs of the firm, namely, trying cases and obtaining settlements; they therefore exercised a significant degree of direction over the affairs of the enterprise), *cert. denied,* 513 U.S. 1110 (1995); ***Thomas v. Ross & Hardies***, 9 F. Supp. 2d 547, 554-555 (D. Md. 1998) (outside attorney who played a central active role in phoney home mortgage scheme was managing or operating the enterprise); ***Mruz v. Caring, Inc.***, 991 F. Supp. 701, 719-721 (D. N.J. 1998) (outside attorneys who allegedly orchestrated efforts of company to conceal Medicaid and tax fraud by systematically intimidating witnesses); ***In re American Honda Motor Co., Inc. Dealerships Litigation***, 958 F. Supp. 1045, 1056-1059 (D. Md. 1997) (attorneys who also allegedly counseled witnesses to give evasive or incomplete testimony, directed American Honda to make false and misleading assertions about the results of their investigation of the kickback scheme and were in charge of the concealment); ***In re American Honda Motor Co. Inc. Dealerships Litigation***, 941 F. Supp. 528, 559-560 (D. Md. 1996) ("Th[e] cases reveal an underlying distinction between acting in an advisory professional capacity (even if in a knowingly fraudulent way) and acting as direct participant in

[an enterprise's] affairs." Attorney defendants were paid directors with a full voice on American Honda; moreover, they allegedly played a direct management role with respect to policy and procedure for handling the bribery scheme by fielding complaints from dealers who didn't pay bribes, by handling internal investigations and assisting in concealing the scheme from discovery); ***Crowe v. Smith***, 848 F. Supp. 1258, 1264-1265 (W.D. La. 1994) (lawyer alleged to be a principal in fraudulent scheme to divest plaintiffs of their land holdings; his letter writing and filing of lawsuits against Crowe were all part and parcel of the scheme), *rev'd on other grounds sub nom.* ***Crowe v. Henry***, 43 F.3d 198 (5th Cir. 1995), and ***Crowe v. Henry***, 115 F.3d 294 (5th Cir. 1997); ***Arons v. Lalime***, 3 F. Supp. 2d 314, 322 (W.D.N.Y. 1997) (fact that attorney received a contractual five percent share of profits from allegedly fraudulent scheme is enough to satisfy Reves test; attorney's time sheet reflected only eight hours of legal work); ***Tribune Co. v. Purcigliotti***, 869 F. Supp. 1076, 1097 (S.D.N.Y. 1994) (doctor, who aided massive scheme to file false workman's compensation claims by falsely certifying audio grams he performed, participated in "core activities" of the enterprises) *aff'd sub nom.* ***Tribune Co. v. Abiola***, 66 F.3d 12 (2nd Cir. 1995); ***Lust v. Burke***, 876 F. Supp. 1474, 1482 (D. Md. 1994) (refusing to dismiss RICO claims against accountant who was allegedly a principal in several of the fraudulent investment schemes); and, ***Shuttlesworth v. Housing Opportunities Made Equal***, 873 F. Supp. 1069, 1075 (S.D. Ohio 1994) (attorneys who allegedly solicited false sexual harassment complaints against landlord in effort to deprive hm of his rental properties played significant role in enterprise.

Significant, however, is the increasing trend of other federal courts to depart from the harsh application of ***Reves*** and examine it upon an individual fact specific basis regarding

no professional "outsiders." These judicial expressions warrant serious consideration in connection with re-examining *Reves*. *See LSJ Investment Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (suggesting that controlling shareholder's power to direct operation or management of the enterprise is sufficient); *Aetna Casualty & Surety Co. v. P&B Autobody*, 43 F.3d 1546, 1559-1560 (1st Cir. 1994) (jury could find that autobody shop defendants exerted some control over Aetna – the enterprise – by causing corrupt Aetna appraisers to approve false claims, thereby directing some aspect of the enterprise's affairs); *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 380 (6th Cir. 1993) (insurance company exercised sufficient control over affairs of the enterprise even if it is not liable base on its agent's control of the enterprise), *cert. denied*, 510 U.S. 1193 (1994); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1542 (10th Cir. 1993) (sufficient evidence supported jury finding that officers of parent company controlled operations of affiliate reseller of automobile notes); *Tribune Co. v. Purcigliotti*, 869 F. Supp. 1076, 1099 (S.D.N.Y. 1994) (unions played a management role in that they participated in the development and implementation of fraudulent scheme to file false workman's compensation claims and coordinated scheme by directing their members to take certain actions to carry it out); *Edison Elec. Inst. v. Henwood*, 832 F. Supp. 413, 416-417 (D.D.C. 1993) (outside contractors exercised control of plaintiff company through its bribed employee who was paid kickbacks to approve false invoices); *Brown v. LaSalle N.W. Nat'l Bank*, 820 F. Supp. 1078, 1082 (N.D. Ill. 1993) (bank had sufficient control over fraudulent scheme that omitted provisions in loan documents); *Toucheque v. Price Bros., Co.*, 5 F. Supp. 2d 341, 348 (D. Md. 1998) (when lower level employees are involved, nothing in *Reves* limits RICO liability to those who commit predicate acts at the express direction of upper management; if such employees are

generally under the supervision of higher management, they are liable even if upper management neither knew nor approved of the employees' racketeering activities); ***National Org. for Women, Inc. v. Scheidler***, 1997 WL 610782, at * 10 (N.D. Ill. Sept. 23, 1997) (RICO enterprise may be operated by upper management, lower rung participants who are under upper management's direction, or others associated with the enterprise who exert control over it); and, ***In re ZZZZ Best Securities Litigation***, No. CV-87-3574 RSWL (C.D. Calif. October 26, 1994) (LEXIS, Genfed library, Dist file) (non managing underwriters of public securities offering had sufficient influence over the underwriting syndicate to satisfy the ***Reves*** standard). ***But see Tonnemacher v. Sasak***, 859 F. Supp. 1273 (D. Ariz. 1994), where an outside accounting firm engaged in a fraudulent scheme to obtain money by deception through the issuance and sale of limited partnership units. The district court found that the firm did not participate in the operation or management of the enterprise (the hiring partnership); it was, therefore, not liable under Section 1962(c): "[w]hether accounting services are performed competently or incompetently, properly or improperly, is irrelevant to the ***Reves*** analysis." ***Id***. at 1276. The court similarly found no liability under RICO Section 1962(d), but properly noted that "if the Plaintiffs can establish that [the accounting firm] intended to participate in a RICO conspiracy, [it] may be liable under 1962(d) regardless of whether [it] committed the substantive RICO offense." ***Id***. at 1278.

The apparent dissension amongst the federal courts over the lack of uniform application and fluid interpretation of ***Reves*** supports review by this Court. The court in ***Handeem v. Lemaire***, 112 F.3d 1339 (8th Cir. 1997) succinctly posited the quintessential issue revolving upon the interpretation of ***Reves***:

> The polestar is the activity in question, not the defendant's status.

Handeem, 112 F.3d at 1349.

Resolution of the conflicting positions of the federal circuits regarding the appropriate interpretation of ***Reves*** can be achieved through review of this Court's decisions construing RICO. In its principal RICO decisions, including ***Salinas v. United States***, 522 U.S. 52 (1997), ***NOW v. Scheidler***, 520 U.S. 249 (1994), ***Alexander v. United States***, 509 U.S. 544 (1993), ***Holmes v. Securities Investor Protection Corp.***, 503 U.S. 258 (1992), ***Tafflin v. Levitt***, 493 U.S. 455 (1990), ***H.J., Inc. v. Northwestern Bell Telephone Co.***, 492 U.S. 229 (1989), ***Caplin & Drysdale v. United States***, 491 U.S. 617 (1989), ***United States v. Monsanto***, 491 U.S. 600 (1989), ***Agency Holding Corp., v. Malley-Duff & Assoc.***, 483 U.S. 143 (1987), ***Shearson/Am. Express, Inc. v. McMahon***, 482 U.S. 220 (1987), ***Sedima, S.P.R.L. v. Imrex Co.***, 473 U.S. 479 (1985), ***Russello v. United States***, 464 U.S. 16 (1983), and ***United States v. Turkette***, 452 U.S. 576 (1981), this Court has acknowledged several propositions of statutory construction, established the basic principles that govern the interpretation of RICO, and consistently applied them to the statute:

> (1) read the language of the statute, ***NOW***, 114 S. Ct. at 804; ***Holmes***, 503 U.S. at 266; ***Tafflin***, 493 U.S. at 460; H.J., Inc., 492 U.S.at 237 (citing ***Russello***); ***Monsanto***, 491 U.S. at 606 (citing ***Turkette***); ***Shearson***, 482 U.S. at 227; ***Sedima***, 473 U.S. at 495 n. 13; ***Russello***, 464 U.S. at 20 (citing ***Turkette***); ***Turkette***, 452 U.S. at 580, 593;

(2) language includes its structure, ***NOW***, 114 S. Ct. At 804; ***Agency Holding Corp.***, 483 U.S. at 152; ***Sedima***, 473 U.S. at 489-90 n. 8, 496 n.14, ***Russello***, 464 U.S. at 22-23; ***Turkette***, 452 U.S. at 581, 587;

(3) language should be read in its ordinary or plain meaning, but must be viewed in context, ***H.J., Inc.***, 492 U.S. at 238 (citing ***Richards v. United States***, 369 U.S. 1, 9 (1962)); ***Sedima***, 473 U.S. at 495 n. 13; ***Russello***, 464 U.S. at 20 (citing ***Turkette***), 21-23; ***Turkette***, 452 U.S. at 580, 587;

(4) language should not be read differently in criminal and civil proceedings, ***H.J., Inc.***, 492 U.S. at 236 (citing ***Sedima***)); ***Shearson***, 482 U.S. at 239-40; ***Sedima***, 473 U.S. at 489, 492;

(5) look to the legislative history of the statute, ***Holmes***, 503 U.S. 267; ***Tafflin***, 493 U.S. at 461; ***H.J., Inc.***, 492 U.S. at 236-39 (citing ***Sedima***); ***Monsanto***, 491 U.S. at 613; ***Agency Holding Corp.***, 483 U.S. at 151; ***Shearson***, 482 at 238-41; ***Sedima***, 473 U.S. at 486, 489; ***Turkette***, 452 U.S. at 586, 588-91, but it takes clear legislative history to vary the text, ***NOW***, 114 S. Ct. at 806 (citing ***Turkette*** and ***Reves***); ***Reves***, 113 S. Ct. at 1169 (citing ***Turkette***); ***Turkette***, 452 U.S. at 580;

(6) look to the policy of the statute, ***Tafflin***, 493 U.S. at 467; ***Sedima***, 473 U.S. at 493; ***Russello***, 464 U.S. at 24; ***Turkette***, 452 U.S. at 590;

(7) the statute was aimed at the infiltration of legitimate business by organized crime, ***NOW***, 114 S.Ct. at 805 (citing ***H.J., Inc.***); ***H.J., Inc.***, 492 U.S. 242-49 (citing ***Sedima***); ***Sedima***, 473 U.S. at 495, 499; ***Russello***, 464 U.S. at 28; ***Turkette***, 452 U.S. at 590-91;

(8) the statute is to be broadly read and liberally construed, ***Holmes***, 503 U.S. at 274; ***Tafflin***, 493 U.S. at 467 (citing ***Sedima***); ***H.J., Inc.***, 492 U.S. at 237; ***Monsanto***, 491 U.S. at 609 (citing ***Sedima***); ***Sedima***, 473 U.S. at 491-92 n. 10, 497-98; ***Russello***, 464 U.S. at 21; ***Turkette***, 452 U.S. at 587, 593; and,

(9) where Congress rejects proposed limiting language in a bill, it may be presumed that the limitation was not intended, ***Russello***, 464 U.S. at 23.

These general propositions of statutory construction of the interpretation of RICO advance the statute's Liberal Construction Clause, RICO Section 1964. Application to those propositions clearly evidence the intent of Congress to have RICO construed expansively in order to achieve its envisioned objective of eradicating criminal activity that affects the economic fiber of American society. Reading RICO is basically a question of the "language of the statute . . - the most reliable evidence of its intent." ***Turkette***, 452 U.S. at 593. Read literally, the propositions are uncomplicated and unambiguous.

The basic principles for reading that language should not vary here from those already established by the Supreme Court in other contexts. Title 18 of the United States Code,

of which RICO is a part, is "codified and . . . positive law." Act of June 25, 1948, c. 645, § 1, 62 Stat. 683; see Title 1 U.S.C. §§ 112 (statutes at large, not titles of code, are authoritative), 204 (title of code, if positive law, are authoritative); see also, J. Myron Jacobstein & Roy M. Mersky, *Fundamentals of Legal Research,* 143-45 (1987)) (discussing reading statutes). In particular, RICO is Chapter 96 of Title 18; it s not an independent or free standing statute, as are, for example, the securities laws or the antitrust statutes. *See, e.g.*, ***Central Bank of Denver v. First Interstate Bank***, 511 U.S. 164, 114 S.Ct., 1499, at 1450-52, 128 L.Ed.2d 119 (1994) (Title 18 construed with specific statutes). As the Ninth Circuit's opinion in ***In re American Continental Corp./Lincoln Sav. & Loan Securities Litigation***, 1994 U.S. App. LEXIS 13184 (9th Cir. May 23, 1994), holds, the individual provisions of Title 18 were drafted from the perspective of the criminal liability of a principal in the first degree. Neither accessories nor aiders and abettors are expressly mentioned in each substantive offense. Their mention comes in Chapter 1. General Provisions, which applies throughout the Title. Title 18 U.S.C. § 2. "[A]iding and abetting 'is not a separate offense' from the underlying substantive crime." ***United States v. Mitchell***, 23 F.3d 1, 2-3 (1st Cir. 1994) (quoting ***United States v. Sanchez***, 917 F.2d 607, 611 (1st Cir. 1990), *cert. denied*, 499 U.S. 977 (1991)).

Indeed, it is not even necessary to expressly charge aiding and abetting before the jury may be instructed on it and may return a verdict on that theory of liability. ***Sanchez***, 917 F.2d at 611; accord, ***Standefer v. United States***, 447 U.S. 10, 19 (1980) (accessories may be convicted even without conviction of underlying perpetrator). Since Section 2 expressly makes all accessories before the fact and aiders and abettors liable for any offense under Title 18 "punishable as

a principal," 18 U.S.C. § 2, repeating accessory or aiding and abetting language in each substantial offense under Title 18 is not necessary. *See, e.g.*, ***United States v. Tobon-Builes***, 706 F.2d 1092, 1099 (11th Cir. 1983) (reference to § 2 in § 1001 omitted as unnecessary by revisors). Sharon C. Lynch, ***Drug Kingpins and Their Helpers: Accessories Liability under 21 U.S.C. Section 848***, 58 U. Chi. L. Rev. 391, 395 (1991) ("The original accomplice liability statute had two purposes: abolishing the common law distinction between different levels of accomplice liability, and eliminating the need to attach an aiding and abetting section to each new substantive offense.").

RICO's text expressly incorporates Section 2 by making its criminal and civil provisions dependent upon "violations." Title 18 U.S.C. § 1963 ("Whoever ***violates*** any provision of Section 1962. . . .") (emphasis added); Title 18 U.S.C. § 1964 ("Any person injured . . . by . . . a ***violation*** of section 1962. . . .") (emphasis added). "Violation" does not have a different meaning in the two sections because the definition of the word is not different in its verb or noun form. ***XIX The Oxford English Dictionary*** 653 (2d ed. 1989). *See* ***Reves***, 113 S. Ct. at 1169 ("[I]t seems reasonable to give each use [as a verb and as a noun] a similar construction."); ***Sedima***, 473 U.S. at 489 ("We should not lightly infer that Congress intended [violations] to have wholly different meanings in neighboring [sections.]"). In RICO litigation, a "violation" of a § 1962 expressly requires a "pattern of racketeering activity." Title 18 U.S.C § 1962. "Racketeering activity" is expressly defined in each paragraph of § 1961(1) with words that refer to ***criminal*** jurisprudence. ***Id.***, § 1961(1)(A) ("any act . . . ***chargeable*** under State law and punishable") (emphasis added); § 1961(1)(B) ("any act . . . ***indictable*** under . . . [specified] provisions of title 18") (emphasis added); § 1961(1)(C) ("any act . . . ***indictable***

under [specific provisions of] title 29") (emphasis added); § 1961(1)(D) ("any [specified] offense . . . ***punishable***") (emphasis added); or § 1961(1)(E) (any act . . . ***indictable*** under the Currency and Foreign Transaction Reporting Act") (emphasis added).

Acts constituting aiding and abetting a substantive offense are "indictable" as the substantive offense. *See, e.g.*, ***United States v. Oates***, 560 F.2d 45, 53-55 (2nd Cir. 1977) (one who aids and abets may be charged as if he committed the crime himself), *aff'd*, 591 F.2d 1332 (2nd Cir. 1978); ***United States v. Private Sanitation Indus. Ass'n***, 793 F. Supp. 1114, 1134 (E.D.N.Y. 1992) (mail fraud) (aider and abettor charged as if committed underlying crime); ***Firemen's Fund Ins. Co. v. Plaza Oldsmobile Ltd.***, 600 F. Supp. 1452, 1456 n. 2 (E.D.N.Y. 1985) (mail fraud) (same). That the drafters of RICO's provisions contemplated the application of criminal and civil accessory and aiding and abetting theory, therefore, ought to be beyond serious question. The express reference to § 2 in Section 1962(a) (investment or use) was included to assure that the prohibition of the investment or use of the proceeds of racketeering activity did not extend to accessories after the fact), H.R. Rep. No. 91-1549 at 57 (1970); S. Rep. No. 91-617 at 122-23, 159 (1969); ***Measures Relating to Organized Crime: Hearing on S.30 Before the Senate Judiciary Subcomm. on Crim. Laws and Proc., 91st Cong., 1st Sess.*** (1969) (letter of Deputy Attorney General Kleindienst. Section 1962(d) (conspiracy) was also expressly included in § 1962 to eliminate the overt act requirement applicable when Section 371 is used under RICO, to raise the penalty for conspiracy under RICO to twenty years from five years under Section 371, and to authorize consecutive sentences under RICO and Section 371; it was not included to provide for conspiracy, but not aiding and abetting liability, under RICO. S. Rep. No. 91-617, at 159.

Finally, if a straightforward textual reading of RICO does not lead to a finding of criminal and civil accomplice liability and "a clear tie-breaker" is necessary, because "contextual analysis" results in a "tie," ***Reves***, 113 S. Ct. at 1175 (Souter, J., in dissent), then the Liberal Construction Clause ought to be read to play that role. Reading the possibility of accomplice liability or RICO's provision of conspiracy liability in terms of the maximum ***expressio unius*** to exclude accomplice liability or to create a new, but narrower form of conspiracy liability - either criminally or civilly - is squarely inconsistent with RICO's Liberal Construction Clause. ***Reves***, 113 S. Ct. at 1172 (clause "ensure[s] that Congress' intent is not frustrated by an overly narrow reading of the statute"); ***Securities and Exchange Commission v. C.M. Joinder Leasing Corp.***, 320 U.S. 344, 350-51 (1943); (***expressio unius*** gives way to statutory intent and policy); ***United States v. Barnes***, 222 U.S. 513, 519 (1912) (***expressio unius*** is "a rule of construction, not of substantive law").

Accordingly, RICO ought to be read - in the matter of its text, its Liberal Construction Clause, and general jurisprudence - to achieve accomplice liability - criminally and civilly.

Based on the expansive treatment and judicial construction of RICO, a serious re examination of ***Reves*** by this Court is warranted. Continuing and mounting inconsistent interpretations and permutations of ***Reves*** will only serve to further frustrate the ability of federal courts to properly construe it. This is the opportunity for this Court to reassess ***Reves*** in light of the RICO Liberal Construction Clause and this Court's prior interpretations of that Clause in order to effect fluid judicial symmetry.

ARGUMENT 3

The construction of *Reves v. Ernst & Young* is diametrically inapposite with the decision of this Court in *Salinas v. United States*

Petitioners contend that ***Reves*** is diametrically inapposite of ***Salinas v. United States, 522 U.S. 52 (1997)*** inasmuch the federal courts have applied the reasoning of the former to affect the latter. ***Salinas***, a RICO Section 1962(d) conspiracy case, resolved the conflict between the federal circuits as to whether the agreement to commit the predicate acts must be an agreement on the part of the defendant personally to commit two acts of racketeering activity. In ***Salinas***, this Court ruled that this was not an essential element of the culpable agreement: "A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. . . . A conspirator must intend must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense. . . . He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion." ***Salinas***, 522 U.S. at 65.

Reves declared that no liability can issue under RICO Section 1962(c) "unless one has participated in the operation or management of the enterprise itself." ***Reves***, 507 U.S. at 183. This is the precise basis the Court of Appeals here sustained summary judgment against Petitioners.

Petitioners duly note that the federal circuits are split as to whether the operation and management test applies to an alleged conspiracy to contravene RICO Section 1962(c) – that is, as to whether there is a distinction to be delineated between, on the one hand, conspiring to operate or manage an

enterprise, and, on the other, conspiring with someone else is operating or managing the enterprise. The Third and Ninth Circuits draw this distinction and recognize liability only under the former scenario (conspiring to operate or manage) and not under the later (conspiring with someone who is operating or managing). These courts represent the minority view, which posits that a contrary holding would effectively eviscerate ***Reves***. ***See United States v. Antar***, 53 F.3d 568 (3rd Cir. 1995) and ***Neibel v. Trans World Assurance Co.***, 108 F.3d 1123 (9th Cir. 1997).

Quoting ***Antar***, the Ninth Circuit in ***Neibel*** stated:

> We believe that a distinction can be drawn between, on the one hand, conspiring to operate or manage an enterprise, and, on the other, conspiring with someone who is operating or managing the enterprise. Liability under section 1962(d) would be permissible under the first scenario, but, without more, not under the second. This is because in the former situation, the defendant is conspiring to do something for which, if the act was completed successfully, he or she would be liable under section 1962(c). But in the latter scenario, the defendant is not conspiring to do something for which he or she could be held liable under the substantive clause of the statute. Therefore, liability should not attach. ***Antar***, 53 F.3d at 581.

Neibel, 108 F.3d at 1128.

The Second, Fifth, Seventh, and Eleventh Circuits comprise the majority view, holding that ***Reves***' management

and control test does not apply to a RICO conspiracy claim. These courts consider that, since ***Reves*** did not address a RICO Section 1962(d) conspiracy claim, it has no bearing on a RICO conspiracy claim, irregardless of whether the alleged conspirators are plotting a RICO Section 1962(c) contravention. *See* ***United States v. Quintanilla***, 2 F.3d 1469 (7th Cir. 1993); ***United States v. Starrett***, 55 F.3d 1525 (11th Cir. 1995), *cert. denied*, 517 U.S. 1127 (1996); ***Napoli v. United States***, 45 F.3d 680 (2nd Cir.), *cert. denied*, 514 U.S. 1134 (1995). *See also* ***Jones v. Meridan Towers Apts.***, 816 F. Supp. 762, 773 (D.D.C. 1993) ("to hold that under § 1962(d) a plaintiff must show that an alleged coconspirator was capable of violating the substantive offenses under § 1962(c), that is, that he participated to the extent required by ***Reves***, 'would add an element to RICO conspiracy that Congress did not direct'").

The majority rule is consonant with the bright line distinction drawn by this Court in ***Salinas***, between RICO substantive and RICO conspiracy offenses. It also appears – in RICO criminal conspiracy cases, such as ***Salinas*** – to promote the anti racketeering goals animating the statute.

Petitioners recognize that on April 26, 2000, this Court announced ***Beck v. Prupis***, 529 U.S. ____ (2000), distinguishing between RICO criminal and RICO civil conspiracy claims. ***Beck*** inexplicably engrafts a proximate causality requirement upon a civil RICO conspiracy claimant, requiring that the injury be proximately caused by the commission of racketeering activity, premising its reasoning upon application of civil conspiracy law. Petitioners contend that since ***Beck*** restricted civil relief under RICO Section 1962(d) context, it arguably follows that the heretofore recognized minority position discussed above supports the position that the conspiracy claim can successfully be

maintained. This position is supported by the Ninth Circuit in ***Neibel***:

> We have never considered directly whether a civil conspiracy claim can survive if the substantive claim does not. In ***United States v. Ohlson,*** 552 F.2d 1347, 1349 (9th Cir.1977), we held that in a criminal RICO proceeding, the crime of conspiracy could exist independently of the substantive offense. Since the Ninth Circuit generally treats criminal and civil RICO claims alike, ***Chang v. Chen,*** 80 F.3d 1293, 1297 n. 1 (9th Cir.1996), we hold that a section 1962(d) claim may proceed to a jury despite a directed verdict on the section 1962(c) claim. ***See Gagan v. American Cablevision,*** 77 F.3d 951, 961, 964 (7th Cir. 1996).

Neibel, 108 F.3d at 1127-28.

Additionally, the strained judicial tension between ***Reves*** and ***Beck*** is further exacerbated when examined in conjunction with ***Pinkerton v. United States***, 328 U.S. 640 (1946), a decision cited and followed with approval by this Court in ***Salinas***. The inapposite positions taken by this Court in ***Reves*** and ***Beck*** is inexplicably inconsistent with its ***Salinas*** decision. ***Pinkerton***, like ***Salinas***, ascribes liability to a RICO coconspirator without the requirement of personal commission of racketeering activity in furtherance of a RICO conspiracy. Based on the interpretation of this Court's prior rulings expansively construing RICO, the effect of ***Reves***, examined in conjunction with ***Beck***, seemingly undermines ***Salinas***. This is antithetical of the Court's consistently positive interpretation of the RICO Liberal Construction. As

such, ***Reves*** and ***Beck*** pose a significant threat to effectively curtail the intended application of civil RICO by erecting obstacles on its remedial pathway.

Under ***Pinkerton,*** an agreement to commit a crime or crimes is a prerequisite for liability. If such an agreement existed, anyone who joined it is liable for offenses other conspirators commit to advance the objectives of their agreement.[3] The act of agreeing to the commission of certain crimes suffices; it is not necessary that one commit any affirmative act to advance the realization of the goals of the conspiracy. Complicity differs in two respects. First, one can "aid and abet" the commission of a crime without entering into an agreement to this effect.[4] Second, to incur aiding and abetting liability, it is not sufficient to associate oneself with a criminal venture; it is also necessary to commit an affirmative act that is intended to further the commission of a substantive offense.[5] Still, ***Pinkerton*** recognizes affiliative liability where an individual is deemed to have committed a substantive offense even though that person was not present at its commission and did not physically consummate it.

Both ***Pinkerton*** and rules of complicity accomplish this through a singular vehicle: they attribute causation for crimes that are physically perpetrated by another on the basis of a unique "bad act' - that of entering into a criminal affiliation. The premise of these doctrines is that the act of aligning

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[3] *Id.* at 647.

[4] ***See Iannelli v. United States,*** 420 U.S. 770 (1975).

[5] ***See United States v. Galiffa,*** 734 F.2d 306, 311 (7th Cir. 1984) (aiding and abetting a conspiracy).

oneself with others to pursue a criminal purpose has causal significance. The causal import of this act is an instance of "mediate causation."

Brenner's treatment of ***Pinkerton*** in the context of examining affiliative liability is noteworthy for consideration by this Court in examining the doctrine's impact upon ***Beck***:

> This act [affiliating with another for a criminal purpose] satisfies the criteria for imposing accountability under the traditional criminal law standard of personal liability: affiliating with another for criminal purposes is a voluntary act committed with a culpable mental state, or ***mens rea***, that causes a prohibited social harm. (footnote omitted). In either of its guises, as ***Pinkerton*** liability or as complictious liability, this act is clearly more culpable than the act that suffices for imposition of vicarious liability in civil law. . . . The only element of criminal liability that is attenuated under ***Pinkerton*** is causation, which receives the same treatment accorded it under the kindred doctrine of accomplice liability. Liability can attach under either form of affiliative liability without showing that the affiliative act actually caused commission of certain crimes. (footnote omitted). And because the affiliative act is a wrong in itself, liability can attach even though the target crime was not accomplished.[6]

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[6] Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying* ***Pinkerton*** *Liability to RICO Actions*. 56

Affiliative liability, therefore, is judicially recognized and appropriately applicable to ascribe ***Pinkerton*** liability to RICO co-conspirators whose offense is consummating the illegal agreement to contravene RICO substantive provisions. Brenner's expose on the application of ***Pinkerton*** aptly reveals that "guilt by association" is in fact a viable legal instrument for RICO Section 1962(d) conspiratorial liability. Instead of abrogating "the need for a personal ***actus reus***" as an element of liability, (footnote omitted) the ***Pinkerton*** doctrine holds a party liable for the consequences of a specific personal act – affiliating with another for criminal purposes. This act permits imposition of liability for crimes committed by those with whom one shares such a relationship. The non-acting party is liable for these offenses because her criminal act of allying herself with the acting party "caused" them to be committed.[7]

No rational justification militates against employing ***Pinkerton*** in the civil RICO conspiratorial context. Its invocation is consonant with advancing the RICO Liberal Construction Clause eradicate innumerable forms of racketeering activity and to reach those perpetrators who occupy conspiratorial capacities who do not actually commit the offenses.

It is significant to understand that ***Pinkerton*** is not actually a rule of vicarious liability. Because the opinion includes agency terminology, this case has been construed as imposing vicarious liability. Rather than abrogating the personal act requirement, ***Pinkerton*** holds one liable for the

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MO. L. Rev. 931, 963-64 (1991)

[7] *Id.* at 953-57, 961-62.

act of aligning oneself with other for criminal purposes; having done so, each non acting member of the conspiracy is liable for crimes committed by other conspirators because the acts of alliance caused those crimes to be committed. This affiliative act is sufficient to satisfy the traditional causation requirements of criminal liability. Indeed, this act is certainly more blameworthy than the acts that suffice for imposing civil vicarious liability. The only element of criminal liability that is attenuated under ***Pinkerton*** is causation, which is construed just as it is under general complicity doctrines. Neither the ***Pinkerton*** doctrine nor complicity requires that one's wrongful act actually cause the commission of the crime for which one is held accountable.

Rather, they rely upon the concept of "mediate causation."[8] "Mediate causation" refers to situations in which one's acts are deemed to have exerted a causal effect on another's conduct. Application of this conception of causation avoids the difficult task of specifying the actual effect such acts had on another's conduct by making it possible to assume a causal effect sufficient to support liability. The result is the imposition of criminal liability that comports with traditional requirements by including the element of demonstrable personal fault:

> "Mediate causation" denotes instances in which an individual's actions can be deemed to have exerted ***some*** causal effect upon another's conduct. It resolves the problem of attempting to identify the extent to which one person's acts ***actually*** affected another's conduct by making it possible, under certain

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[8] *Id.* at 944-78.

circumstances, to ***assume*** a causal effect that is sufficient to support imposition of criminal liability.[9]

As Brenner states, the ***Pinkerton*** doctrine is disconcerting "because it is not intuitively obvious why members of a conspiracy should be liable for crimes committed by their fellows."[10] The ***Pinkerton*** opinion's facial discussion of that issue has undoubtedly contributed to the doctrine's being characterized as problematic and inconsistent with traditional principles of criminal liability. While other theories can be offered to explain his perfunctory treatment of this question, it may be that Justice Douglas felt his discussion was adequate because co-conspirator liability already seemed to be well entrenched in American criminal jurisprudence. Affiliative liability, therefore, is judicially recognized and appropriately applicable to ascribe ***Pinkerton*** liability to RICO co-conspirators whose offense is consummating the illegal agreement to contravene RICO substantive provisions.

Petitioners contend that the Court of Appeals erroneously applied ***Reves*** to sustain summary judgment on the RICO Section 1962(d) claim and that by virtue of ***Salinas***, the conspiracy remained independently viable not withstanding the adverse disposition of the RICO Section 1962(c) substantive fraud claim. This position is consonant with ***Pinkerton*** and should be followed by this Court. This inter federal circuit conflict is not resolved by ***Beck***, and therefore review of this significant issue is warranted.

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[9] ***Id.*** at 974-75, nn. 189-190.

[10] ***Id.*** at 944.

CONCLUSION

The Court of Appeals' interpretation of ***Reves*** in this case is inconsistent with the underlying bases of the RICO Liberal Construction Clause. The Panel's application of ***Reves'*** ill defined contours perilously threatens to engender further confusion and exacerbate divisiveness among the federal circuits over the terms "conduct" and "participate in" the affairs of an enterprise in the RICO Section 1962(c) context. The dissension arising from the conflicting positions espoused by the federal courts over what is, and what is not, the proper interpretation of ***Reves***, is significant. ***Reves'*** similarly amorphous impact upon RICO Section 1962(d) conspiracy claims is equally disturbing. The absence of judicial symmetry in these two areas requires review. Supreme Court guidance is necessary and critical to prevent the federal courts from eviscerating the RICO statute by severely restricting its application.

The Petition for a Writ of Certiorari should be granted. Otherwise, this Court will experience (a) further schisms between ***Reves***, ***Salinas***, and ***Beck***, and (b) the increasing confusion which will arise in the federal courts with respect to the proper scope of the RICO Liberal Construction Clause and its interpretation to effectuate Congress's contemplated objectives under RICO.

June 7, 2000

/s/_____

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed March 17, 2000]

No. 99-35485

LARRY FESSLER and SUSAN D. FESSLER
Plaintiffs-Appellants,

v.

BAYSHORE REALTY INC., an Oregon corporation; CORY COMSTOCK; JOHN C. JENSEN, and DAVID O. QUINN,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Dennis James Hubel, Magistrate Judge, Presiding

Argued and Submitted March 7, 2000
Portland, Oregon

MEMORANDUM[1]

Before: GOODWIN, GRABER, and FISHER Circuit Judges.

Plaintiffs negotiated the purchase of a beach house with defendant Bayshore Realty ("Bayshore"), a corporation owned by defendant Comstock. The seller of the beach home was defendant Jensen.[2] On Comstock's recommendation, Plaintiffs hired defendant Quinn to inspect the house. According to Plaintiffs, Quinn's inspection report failed to disclose material defects, notably dry rot, causing them to pay too much for the house.

After extensive litigation in state court, Plaintiff commenced this action in federal court alleging violations of the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C, §§ 1961-1968. The district court granted summary judgment to Defendants. On de novo review, see Margolis v. Ryan 140 F.3d 850, 852 (9th Cir, 1998), we affirm.

CLAIM PRECLUSION

Judgment was rendered in favor of the Bayshore defendants in Plaintiffs' 1993 fraud action in state court. This court must give that final judgment the same preclusive effect

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] We refer to these three defendants as "the Bayshore defendants."

that it would have under Oregon law. See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); Feminist Women's Health Ctr. v. Codispoti, 63 F.3d 863, 867 (9th Cir. 1995). Under Oregon law, a plaintiff who has prosecuted one action against a defendant to a final judgment may not pursue a second action against the same defendant if the second action: (1) is based the same "factual transaction" as the first action; (2) seeks a remedy additional or alternative to the remedy sought in the first action; and (3) " is of such a nature as could have been joined in the first action." Drews v. EBI Cos., 795 P.2d 531, 535 (Or. 1990) (quoting Rennie v. Freeway Transp., 656 P.2d 919, 921 (Or. 1982)).

It is undisputed that the first two tests are met. Plaintiffs argue, however, that their RICO claim could not have been raised in the state-court action and do not arise from the same factual transaction as did their state-court claims. Plaintiffs' arguments are unpersuasive.

First, Plaintiffs' RICO claims could have been joined in their state-action. "To prevent splitting of the dispute or controversy, [Oregon] courts employ a broad definition of what could have been litigated." Id. 536. Certainly there was no procedural bar to Plaintiffs' claims; state courts have concurrent jurisdiction over federal civil RICO claims. See Feminist Women's Health Ctr., 63 F.3d at 869.

Nor were Plaintiffs lacking some essential piece of information without which their RICO claims could not have been raised. Plaintiffs were aware of, or could have learned, everything that is essential to their RICO claims at the time they filed their state-court action. Plaintiff Larry Fessler stated in a 1995 written "narrative" of this case that he knew

in April 1993 "that all defendants had worked together to swindle [him]." Plainly, Plaintiffs believed when they filed their state-court action that Defendants had conspired to overcharge them by concealing defects in Jensen's beach house. They could have raised claims relating to that alleged conspiracy in state court, but did not.

Plaintiffs argue that their RICO claims "had not yet fully risen" at the time of their state-court action "because they were not yet aware of the existence of other individuals who had similar experiences with the Bayshore Defendants." That argument is unavailing. Nothing prevented Plaintiffs from obtaining information regarding other alleged victims before or during their state-court action. We note that four of the other alleged victims' experiences occurred in 1993.

Next, Plaintiffs argue that the district court erred in concluding that the RICO claims were based on the same "factual transaction" as their state-court fraud claim. Claim preclusion "applies with respect to all or any part of the transaction or series of connected transactions, out of which the [first] action or proceeding arose." Drews , 795 P.2d at 536 (quoting Restatement (Second) of Judgement § 24(l)). Here, although Plaintiffs have added allegations relating to other purchasers and other properties, they are seeking damages for the same inspection and sale of the same piece of property as in the state-court action. Under the Oregon courts' "broad" view of what constitutes a "factual transaction," see Peterson, 918 P.2d at 417, Plaintiffs' RICO claims clearly arise from the same transaction as did their earlier state-court claims.

Finally, Plaintiffs argue that the district court's order is internally contradictory, because it states that Plaintiffs should have brought their RICO claims against the Bayshore defendants in state court in 1993, but also states that Plaintiffs' RICO claims against the Bayshore defendants are not supported by sufficient evidence. Those holdings are consistent. Claim preclusion does not require that a party have an opportunity to bring a winning claim in a previous proceeding, so long as that claim was available to the party.

In sum, the district court did not err in concluding that Plaintiffs' RICO claims against the Bayshore defendants are barred under the doctrine of claim preclusion.

RICO CLAIMS AGAINST QUINN

The district court ruled that Plaintiffs' RICO claims against Quinn were not barred by claim preclusion, but that Plaintiffs had failed to present sufficient evidence to survive summary judgment.

A. Claims Under Subsection (a)

Plaintiffs' third claim for relief is brought under 18 U.S.C. § 1962(a). As relevant to Quinn, Plaintiffs' complaint asserts that Quinn's $240 inspection fee was income derived from a pattern of racketeering activity. However, the complaint does not allege that Quinn invested that income in any enterprise engaged in or affecting interstate commerce or, indeed, offer any conjecture as to what Quinn did with the money. Accordingly, the complaint is insufficient on its face to state a claim against Quinn for violating subsection (a).

B. Claims Under Subsection (c)

Plaintiffs' primary claims against Quinn are under 18 U.S.C. § 1962(c). Even assuming that Plaintiffs have identified a RICO "enterprise" consisting of the Bayshore defendants, Quinn, and "other central Oregon coast realtors," their claims against Quinn under subsection(c) cannot survive, because they have presented no evidence that Quinn "conducted" or "participated in" that enterprise.[3]

Read liberally, Plaintiffs' complaint alleges a RICO Enterprise in which Quinn agreed to perform bad inspections deliberately so that the Bayshore defendants and other realtors could sell houses for more than they were worth. Plaintiffs have suggested that Quinn's motive for participating in the enterprise was to remain in the good graces of local realtors, who might stop recommending him to buyers if he refused to overlook defects in the homes that he inspected.[4]

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[3] The district court did not rule on that basis, but we may affirm on that ground because the issue was before the district court.

[4] On the other hand, Plaintiffs' complaint and arguments can be read as suggesting that Quinn had a choice between participating in the RICO enterprise or being blacklisted by local realtors and thereby losing his livelihood. That suggestion of coercion cuts strongly against the theory that Quinn directed the affairs or participated in the management of the enterprise. See Pedrina v. Chun, 97 F.3d 1296, 1301 (9th Cir. 1996) (stating that the allegations that the defendant took bribes "in themselves demonstrate that the wrongful conduct of which the [defendant] is accused relates not to his management of the alleged RICO

There simply is no evidence in this record that Quinn had any involvement in the alleged enterprise beyond performing a small number of allegedly defective inspections. Merely providing inspection reports does not amount to "managing" or "directing" the enterprise's affairs as is required to establish that a defendant "conducted" or "participated in" an enterprise's affairs under Reves v. Ernst & Young, 507 U.S. 170 (1993). In Baumer v. Pachl, 8 F.3d 1341 (9th Cir. 1993), the defendant did not conduct or participate in the enterprise's affairs even when he allegedly provided bogus letters, financial reports, and partnership agreements in furtherance of the enterprise. See id at 1344. On this record, Quinn was far less involved in this enterprise than were the defendants in Reves and Baumer. Those defendants did not satisfy the Supreme Court's standard for "conducting" or "participating in" an enterprise's affairs, and a fortiori Quinn does not.

For that reason, the district court did not err in granting summary judgement on Plaintiffs' claim against Quinn under 18 U.S.C. § 1962(c).

C. Claims Under Subsection (d)

Plaintiffs' fifth claim for relief alleges that, "in or about October, 1992," Quinn and the Bayshore defendants "mutually agreed to and intended to engage in the fraudulent conduct" in violation of 18 U.S.C. § 1962(d). In the absence of proof that a defendant has committed a substantive

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enterprise, but rather to his having been controlled by it") (emphasis added).

violation of RICO, a subsection (d) conspiracy can be proved only by evidence showing that the defendant: (1) agreed to conduct or participate in the conduct of the enterprises' affairs; (2) was aware of the nature and scope of the enterprise; and (3) agreed to participate in at least two RICO predicate offenses. See Baumer, 8 F.3d at 1346.

There is no evidence in the record that Quinn agreed to do anything with the other defendants or, indeed, that he ever had any contact with them except during the inspection of Jensen's house. In the absence of any evidence that Quinn met with the other defendants, spoke to them on the telephone or had some other form of interaction with them, there is no basis to conclude that Quinn possibly could have conspired in the manner that Plaintiffs allege. Plaintiffs do not point to any evidence directly supporting this claim.

In short, the district court did not err in granting summary judgment for Quinn on Plaintiffs' claim under 18 U.S.C. § 1962(d).

CONCLUSION

For the reasons stated, the district court did not err in granting summary judgment in favor of Defendants.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

[Filed October 2, 1998]

No. 96-6275-HU

LARRY M. FESSLER and SUSAN D. FESSLER,
Plaintiffs,

v.

BAYSHORE REALTY, INC., an Oregon corporation, CORY COMSTOCK, JOHN C. JENSEN, and DAVID Q. QUINN,
Defendants.

OPINION AND ORDER

HUBEL, Magistrate Judge:

Larry and Susan Fessler, plaintiffs, filed suit against defendants alleging numerous violations of the Racketeer Influenced and Corrupt organizations Act of 19770, ("RICO"), 18 U.S.C. § 1961 et seq. Plaintiffs also allege a state negligence claim against defendant Quinn only. Before the court is defendant Bayshore Realty Inc, Cory Comstock,

and John Jensen's motion (# 69) for summary judgment; defendant David Quinn's motion (# 73) for summary judgment and plaintiffs' motion (# 74) for partial summary judgment on the second and third counterclaims of Bayshore Realty and Cory Comstock.[1]

BACKGROUND

This case involves a land sale dispute and allegations of RICO violations arising from plaintiffs purchase of a home in Waldport, Oregon. The home was purchased from Jensen under a real estate listing agreement with Bayshore Realty's Waldport office. Comstock owns and manages Bayshore Realty. Prior to the property closing, Quinn performed an inspection of the home for plaintiffs. Plaintiffs' allege that Quinn, with knowledge and cooperation of defendants, concealed and failed to report in the inspection results substantial dry rot and other damage, thereby damaging plaintiffs who purchased the house without knowledge of the deficiencies. Plaintiffs contend the concealment of this information is a RICO violation. Plaintiffs' RICO allegations are based on the predicate offenses of mail and wire fraud in the purchase of the home and other "alleged victims" of defendants' fraudulent scheme. After a tortured litigation history in this court and a previous claim based on these same facts in state court, defendants move for summary judgment asserting claim preclusion bars plaintiffs' claims.

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[1] All individual defendants will be referred to by last name. Bayshore Realty, Comstock and Jensen, at times, will also be referred to as "The Bayshore Defendants." Plaintiffs will be referred to individually as L. Fessler, or Mr. Fessler and S. Fessler, or Ms. Fessler

FACTS

Pursuant to the Local Rules of this court, all parties filed separate concise statements of material fact. Pursuant to subsection (f) , all material facts not expressly controverted by the non-moving party's concise statements of fact are deemed admitted.

Plaintiffs are California residents and decided to purchase investment property in Oregon in the summer of 1992. Larry Fessler learned that Jensen's house in Waldport was for sale and made an offer in July of 1992. This offer was rejected. Plaintiffs knew that Jensen's house was managed as a vacation rental by Bayshore Realty. A second offer by the Fesslers was accepted and the house sale closed in January 1993. Mr. Fessler did not have any conversations with Jensen before either of the offers were written.

As part of the sale of the property, a home inspection was performed by Quinn, who was referred to the plaintiffs by Comstock. Before the house was inspected by Quinn, Mr. Fessler, inspected the rental records and receipts kept by Bayshore during its management of Jensen's house. Lewis aff. exh A at 16-18, 44. At deposition, Mr Fessler admitted to making a list of some expenses he found from the Bayshore records. Lewis aff. exh A at 57-59, 97-98. The exhibit to Mr. Fessler's deposition, in which he recorded extraordinary expenses, indicated that close to $1,000.00 was spent in 1991 and $1,250.00 in 1992 for sand removal. Id. at 97-98.

Joanne Ralston, an employee of Bayshore, testified at deposition, that Mr. Fessler spent a considerable amount of time reviewing the rental records over several days. Lewis

aff. exh. B at 2-6. Ms. Ralston testified that Comstock personally told her to let Mr. Fessler review whatever records Bayshore had on Jensen's house. Id. at 5. Mr. Fessler disputes that he saw all the rental files for the Jensen house. Geil aff. exh 1A at 1-2 (Fessler affidavit).

In the course of inspecting the Bayshore records, Mr. Fessler discovered from Comstock that a contractor named Mike Smith had done some repair work on Jensen's house. Lewis aff. exh. A at 19-20. Fessler stated in his first deposition that he did not call Smith because he had no need to do so. Id. at 20

Smith's deposition reveals that he met with Jensen in June of 1991, to discuss repairs to the house. Lewis aff. exh. C at 3. In the course of repairing water damage and replacing some doors, Smith found dry rot in the house. Lewis aff. exh. C at 6. Smith also testified that he repaired some of the dry rot, but not all. Id. Smith took pictures during the course of his work. Smith testified that he never discussed the dry rot with Jensen, nor did he show Jensen the pictures. Id. at 7, 47. Smith did testify that Comstock came out to Jensen's house during the course of the repair work, but that Smith did not recall discussing dry rot with Comstock either before or after the work was done. Id. at 9-10, 47. However there is evidence that Smith might have showed Comstock some of the damaged wood taken out of Jensen's house. Geil aff. exh 10 at 33, 47. Finally, Smith testified that he never received any calls about the repair work he did before plaintiffs purchased the house. Lewis aff. exh. C at 13.

Part of the earnest money agreement required Jensen, the seller, to have the sand removed from the south wall of

the house. On the date the inspection took place, Quinn and Mr. Fessler were both present. The sand on the south wall of the house had not been removed. However, Mr. Fessler authorized Quinn to proceed with the inspection. See Quinn's Concise State. at 10; Plaintiffs' Amended Concise State. at p. 3, line 1. See also Lewis aff. exh. D. at 7 (April 21, 1998) (L. Fessler Depo. II).[2] The exact circumstances of how the inspection was performed and what Mr. Fessler saw during the inspection is in dispute between the parties.

Quinn's inspection report, which plaintiff received and reviewed, is dated October 30, 1992. Lewis aff. exh. A at 69. The report contains references to dry rot on the exterior perimeter structure, garage, roof area, and the deck and patio area. Id. at 76-78. The report also contains a full section on dry rot, and states there is a heavy build-up of sand around the perimeter of the house. Id. at 86. The parties dispute whether Quinn told Mr. Fessler of dry rot areas that were not mentioned in the report. However, at both of his depositions Quinn testified that he was going to wait until the sand was removed from the south side of the house to inspect further in that area. See Exh. 9b attached to Geil Aff. at 50 (April 14,

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[2] Larry Fessler was deposed three times in the course of the litigation between the parties. The dates are: March 28, 1994; July 18, 1997; and December 22, 1997. They will be referred to as L. Fessler Depo. I, II, or III. Five pages of exhibit D are found before exhibit A in the Lewis affidavit. These pages authenticate exhibits from Mr. Fessler deposition. All references to the Lewis affidavit will be to the April 21, 1998, affidavit unless otherwise noted, and page citations are to those numbers in the lower left corner of the exhibit pages.

1998) ; Quinn Depo I attached to DeDobbelaere aff. at 21.[3] Quinn's inspection report also contained several notations of water or moisture problems and areas that needed immediate attention. Lewis aff. exh. A at 58-67.

Fessler acknowledged in his first deposition that sand needed to be removed. At that deposition the following exchange took place:

> Q: Correct. And in your mind you knew that the inspector needed to have the sand removed in order to do a good inspection; is that correct?
>
> A: In my mind, yes."

Quinn Depo I attached to DeDobbelaere aff. at 148. However, Fessler testified at deposition that Quinn told him he did not need to remove the sand to complete the deposition. Geil aff. exh. 11A at 49-50 (L. Fessler depo. I).

Shortly after Quinn's inspection, a contractor named Remington met with Mr. Fessler to discuss the cost of repairs. His bid noted several areas of dry rot and contained a notation on subsequent lines that stated "sand is covering south wall could be Rot?" DeDobbelaere aff. exh. 4 at 2. Mr. Fessler acknowledged reading the bid and being concerned about the

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[3] Quinn was deposed twice: March 28, 1994, and July 16, 1997. Defendant Quinn failed to attach exhibit letters or numbers to the deposition excerpts he uses in support of his motion for summary judgment. Thus, citation to Quinn's deposition excerpt exhibits is somewhat imprecise.

notation concerning dry rot. Geil aff. exh. 11A at 76 (L. Fessler depo. I). Mr. Fessler stated at his deposition that he did not know if Remington was just trying to get more business by noting possible rot, but the inspection report did not, adding "you know, these contractors, you can't trust them." Ultimately, the price of the house was reduced to compensate for the cost of removing the sand that had to be removed. Lewis aff. exh. A at 39-41. Plaintiffs and Jensen released all contingencies to the transaction on December 30, 1992. Lewis aff. exh. A at 65-66 (addendum to sale agreement).[4] Mr. Fessler decided to do the repair work himself, which he started in the Spring of 1993, after the January 1993, closing. At this time he discovered that the dry rot was more extensive that stated in the inspection report.

In September 1993, plaintiffs filed a lawsuit against all the current defendants in the Lincoln County, Oregon Circuit Court. They alleged fraud against the Bayshore defendants and negligence and breach of contract against Quinn. The Bayshore defendants filed a motion for summary judgment, which was granted by Judge Robert Huckleberry's order of

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[4] The Bayshore defendants' concise statement contains a broad statement that the appraiser's report "indicated the presence of dry rot, blowing sand and sand build-up which had an effect on marketability and accounted for a ten percent reduction in value for external obsolescence." Bayshore defendants' amended concise statement at 6, lines 14-17. The Appraisal report attached to the Lewis affidavit at exhibit A pages 90-96. The pages cited by defendants only contains a reference to dry rotted boards on the rear deck. Lewis aff. exh. A at 91. Overstatements such as these, and the resulting critical response from plaintiffs, was a significant impediment to the discovery of the undisputed material facts.

August 8, 1994. Lewis aff. exh. I at 1-2. Judge Huckleberry's Opinion letter of July 21, 1994, stated that "there is an absence of a genuine issue as to any material fact on the claim of misrepresentation, and that summary judgment should be granted in favor of Jensen, Bayshore Realty, Inc., and Comstock." Lewis aff. exh. S. Judgment in favor of the Bayshore defendants was entered on August 8, 1994. Lewis aff. exh. J. A supplemental judgment involving attorney's fees was entered on September 21, 1994. Lewis aff. exh. K.

The claims against Quinn remained and were set for trial. However, on the day of trial, after an adverse ruling from the trial judge on the measure of the damages, plaintiffs voluntarily dismissed their remaining breach of contract claim with prejudice. DeDobbelaere aff. exh. 6. Judgment was entered in Quinn's favor on April 7, 1995. Id. Plaintiffs appealed the judgment against them with respect to all defendants, but then moved to dismiss the appeal as to the Bayshore defendants only. On July 5, 1995, the Oregon Court of Appeals dismissed the appeal as to the Bayshore defendants only. Lewis aff. exh. O. On August 7, 1995, plaintiffs filed a motion for relief from judgment seeking to vacate the state court summary judgment in favor of the Bayshore defendants. Lewis aff. exh. P. On August 14, 1995, Judge Charles Littlehales of the Lincoln County Circuit Court denied plaintiffs' motion seeking relief from judgment. Lewis aff. exh Q.[5]

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[5] Judge Huckelberry removed himself from the case before the decision on the motion for relief from judgment after he disclosed that Quinn had inspected a home he was selling. See pl. exh. 27, filed April 16, 1998 (transcript of March 21, 1995, telephonic hearing before Judge Huckelberry).

After dismissing the state court appeal against the Bayshore defendants, the Oregon Court of Appeals heard an appeal regarding the trial court's dismissal of the negligence claim against Quinn. Fessler v. Quinn, 143 Or.App. 397, 399 (1996). Plaintiffs' voluntarily dismissed contract claim was not before the Oregon Appeals Court. Id. The Court reversed and remanded the dismissal of plaintiffs' negligence claim. Id. at 403. This negligence claim was subsequently consolidated with the federal court action.

STANDARD

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) . If the moving party shows there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue f or trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. - United Steelworkers of America v. Phelps Dodge, 865 F.2d 1539, 1542 (9th Cir.), cert. denied, 493 U.S. 809 (1989).

The substantive law governing a claim determines whether a fact is material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ; see also T.W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. T.W. Elec. Service, 809 F.2d at 631. Inferences drawn from facts are

viewed in the light most favorable to the non-moving party. Id. at 630-31.

To avoid summary judgment, the non-moving party must do more than simply show that there is some metaphysical doubt as to material facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The mere existence of a scintilla of evidence in support of the non-mover's position will be insufficient; there must be evidence upon which the jury could reasonably find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986). "Summary judgment is not precluded simply because there is a dispute of some facts in a case." School Dist. No. 1J, Multnomah Co., v. ACandS, Inc., 5 F.3d 1255, 1264 (9th Cir. 1993), cert. denied, 512 U.S. 1236 (1994) "When the nonmoving party relies on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact." Hansen v. United States, 7 F. 3d 137, 138 (1993)(Per Curiam).

DISCUSSION

I. Defendants' Motions for Summary Judgment

The Bayshore defendants and Quinn move for summary judgment against plaintiffs' RICO claims. The Bayshore defendants and Quinn both assert that claim and issue preclusion bars prosecution of this lawsuit. Both groups of defendants also assert plaintiffs, RICO claims should be dismissed on the merits.

A. Preclusion-Bayshore Defendants

The parties do not dispute that a prior judgment was rendered in this case in favor of the Bayshore defendants. This court must give to that judgment the same preclusive effect as it would receive under the laws of the State of Oregon. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); Feminist Women's Health Center v. Codispoti, 63 F. 3d 863, 867 (9th Cir. 1995) (giving preclusive effect to prior state court judgment under Washington law in a civil RICO case). "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." 63 F.3d at 867.

The Oregon Supreme Court has recently spoken quite clearly on the topics of claim and issue preclusion. Drews v. EBI Companies, 310 Or. 134, 139 (1990), clarified the principle of "[p]reclusion by former adjudication." The Court stated:

> "Preclusion by former adjudication" is a doctrine of rules and principles governing the binding effect on a subsequent proceeding of a final judgment previously entered in a claim. The term comprises, two doctrines: claim preclusion, also known as res judicata, and issue preclusion, also known as collateral estoppel.

Id. The Oregon courts, in what is called the transactional approach, require "a plaintiff [to] join all claims that the

plaintiff has against a particular defendant in a single action when those claims arise from the same set of factual circumstances." Peterson v. Temple, 323 Or. 322, 326 (1996). In Drews, the Court stated:

> "[A] plaintiff who has prosecuted one action against a defendant through to final judgment . . . is barred [i.e., precluded] . . . from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action."

310 Or. at 140 (quoting Rennie v. Freeway Transport, 294 Or. 319, 323 (1982)). The Court also stated that "Claim preclusion does not require actual litigation of an issue of fact or law, as does issue preclusion. Nor does it require that the determination of the issue be essential to the final action, claim or proceeding." Id. The opportunity to litigate, whether it is used or not, and finality are required for claim preclusion to have effect. Id.

The Drews Court went on to state: "Claim preclusion conclusiveness between the parties applies 'with respect to all or any part of the transaction, or series of connected transactions,' out of which the action or proceeding arose." 310 Or. at 141 (quoting Restatement (Second) of Judgments § 24(1). The passage was clarified in Peterson when the Court noted that its "recent decisions have continued to apply a broad definition of the term 'cause of action' and 'claim' for

purposes of enforcing the rule against splitting a claim." 323 Or. at 331. The term claim or cause of action can also be stated as "'a group of facts which entitled plaintiff to relief.'" Id. (quoting Troutman v. Erlandson, 287 Or. 187, 201 (1979)).

The Bayshore defendants assert that because they were granted summary judgment in state court and that judgment is now final, plaintiffs are precluded from now asserting RICO claims arising out of the same set of facts as the state lawsuit.[6] Plaintiffs argue, in part of their opposition memorandum and in Mr. Fessler's affidavit, that they were not aware of the facts necessary to support their RICO claim because many of the facts allegedly did not occur until after the state court summary judgment. Plaintiffs also mistakenly argue that claim preclusion does not apply because different standards of proof governed their state law fraud claims. Plaintiffs' assertions that the state court judgment in favor of the

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[6] Plaintiffs' arguments regarding the effect of the summary judgment in favor of the Bayshore defendants in state court are rejected. "[A] summary judgment motion goes to the merits of a case and, when granted, operates to merge or bar the cause of action for res judicata purposes." Seeborg v. General Motors Corp, 284 Or. 695, 699 (1978); Walti v. Willamette Indus., Inc., 100 Or. App. 89, 93, rev. denied, 309 Or. 522 (1990). Furthermore, there is no requirement that Oregon trial courts state specific reasons for denying or granting a motion for summary judgment; failure to do so is not generally grounds for reversal. Heidtke v. International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers & Helpers, Local 72, 104 Or. App. 473, 476 (1990).

Bayshore defendants is not valid (i.e., fraud, ineffective representation and failure of trial judge to explain rational) do not merit discussion.

In Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, 530-31 (9th Cir. 1987), the Ninth Circuit stated that if plaintiffs were required to prove their common law fraud claim by a clear and convincing standard and their RICO claims by preponderance, they should not be foreclosed from litigating their RICO claims. The court later concluded that the preponderance of the evidence standard applies to civil RICO predicate acts. Id. at 531-31. However, the Wilcox court was presented with the principal of collateral estoppel, or issue preclusion, and not claim preclusion. Id. at 53-31. Analysis of burdens of proof is thus irrelevant to determination of claim preclusion, because under Oregon law a person's claim may be precluded under this doctrine without the actual litigation of the claim. The opportunity to litigate the claim, regardless of the quantum of proof required, determines whether claim preclusion applies. Likewise, comparing the elements of the state law claims and RICO claims, as plaintiffs do in their memorandum, is unnecessary in analyzing the effect of claim preclusion.

Plaintiffs state on page 9. of their opposition memorandum that:

> At the time summary judgment was granted in favor of the Bayshore defendants, plaintiffs' only knowledge was that defendants Bayshore, Comstock, Jensen and Quinn had acted in concert to swindle them. Defendants' evidence says nothing more than this. The

> Fesslers did not know, nor did they have reason to know, that the transaction they were involved in was a pattern of racketeering activity conducted by defendants.

Mr. Fessler's affidavit states that he and his wife did not learn of other victims of the alleged scheme until after the conclusion of the state court case.[7] Nonetheless, later in their memorandum, plaintiffs take the position that even if the court disregards other alleged victims of defendants' scheme, they can satisfy the pattern requirement for RICO claims. Pl. opp. mem. at 28.

There is evidence in the record that Mr. Fessler believed the defendants were working together to defraud him in the spring of 1993. DeDobbeare aff. exh. 7 at 23. That exhibit is a narrative of facts prepared by plaintiffs. The purpose and the recipients of this narrative are uncertain, however Mr. Fessler admitted at his deposition that the document was prepared by he and his wife beginning shortly after the state court summary judgment in 1994. Lewis aff. exh. D at 1B. He stated the narrative was compiled from notes and recollections. Id. The document makes reference to the fact that one of plaintiffs' attorneys in the state court case finally finished reading the depositions for the first time and concluded that "all defendants had worked together to swindle me." DeDobbelaere aff. exh 7 at 23. The narrative goes on to state: "I knew that in April 1993. . . ." Id.

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[7] See Mr. Fessler's corrected and supplemental affidavit attached to plaintiffs' amended concise statements of fact at ¶¶ 4 & 15.

Plaintiffs attempt to avoid the effect of claim preclusion by stating they were not aware of the other victims during the state court action. Pl. opp. mem. at 12. As will be explained further below, the allegations of plaintiffs transaction alone were sufficient to support a RICO claim.

Essentially, plaintiffs claim they received a faulty home inspection which caused them to purchase a home which they otherwise would not have or purchased for more than it was worth. They also claim each defendant knew about the defects in the home and failed to disclose these to plaintiffs. The underlying facts of this case are substantially the same as those in state court. The damages in this case are similar to the damages sought in state court, with the exception of RICO's trebling of damages Plaintiffs believed the defendants acted together to defraud them well before the state-court suit was commenced. The record reflects that other alleged victims existed at the time plaintiffs brought their state court claims. Plaintiffs also take the position in opposition to summary judgment that the facts surrounding their purchase alone are sufficient to sustain their RICO claim. There appears to be no reason why plaintiffs' RICO claims against the Bayshore defendants could not have been brought in state court. Plaintiffs sought to avoid this conclusion by searching for other alleged victims and the alleged existence of a long running pattern of racketeering activity. The evidence of other alleged victims shows nothing more than other people had similar complaints about the quality of Quinn's work. Plaintiffs did not need knowledge of the other alleged victims to allege RICO claims. The court concludes that plaintiffs are precluded from pursuing their RICO claims against the Bayshore defendants. Under Oregon law, plaintiffs could

have and should have brought these claims in state court.[8] Because the court concludes that claim preclusion bars plaintiffs from pursuing their RICO claims, there is no need to discuss issue preclusion. Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731, 746 n. 17 (9th Cir. 1984) (en banc), cert. denied, 474 U.S. 919 (1985).

B. Preclusion-Quinn

Quinn limits his preclusion argument to claim preclusion. Quinn argues that because plaintiffs voluntarily dismissed their claim the day of trial and a final judgment was entered, their RICO claims are barred. Quinn concedes that plaintiffs' negligence claim is not barred by claim preclusion. Thus, regardless of the disposition of the RICO claims, plaintiffs' negligence claims will go to trial. Plaintiffs argue that because the Oregon Court of Appeals reversed and remanded a portion of the state claims against Quinn that they are not barred from litigating those claims now.

The Oregon Court of Appeals decision is reported as Fessler v. Quinn, 143 Or. App. 397 (1996). The Court of Appeals was presented with the following:

> [Plaintiffs] alleged a claim of negligence and a claim for breach of contract against defendant Quinn. . . . On the day of trial, defendant moved to dismiss plaintiffs' negligence claim

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[8] State courts have concurrent jurisdiction over civil RICO claims. Feminist Women's Health Center v. Codispoti, 63 F.3d 863, 869 (9th Cir. 1995).

> pursuant to ORCP 21A(8)[9], arguing that the negligence claim really alleged a breach of contract. The trial court granted defendant's motion. Plaintiffs then voluntarily dismissed their breach of contract claim, and a final judgment was entered dismissing that claim, as well as the negligence claim, with prejudice. Plaintiffs appeal, assigning error to the dismissal of their negligence claim.

143 Or. App. at 399. Quinn argued that plaintiffs' impermissibly appealed judgment on their negligence claim because they voluntarily dismissed their contract claim at trial. Id. The Court dispensed with that argument and stated: "Plaintiffs pled alternate theories based on the same operative facts and chose irrevocably to forgo litigation on their alternative theory. The judgment on their contract claim is final and would prevent relitigation. Id. at 400. The Court concluded that dismissal of the negligence claim was error and reversed and remanded that claim, but otherwise affirmed the judgment of the trial court. Id. at 403.

Thus, it appears there is a final judgment from the state court on plaintiffs' breach of contract claim. However, under Oregon law, for a judgment to have a preclusive effect upon later litigation, the judgment must be final and on the merits. Rennie v. Freeway Transport, 294 Or. 319, 330 (1982). The prior judgment in this case on plaintiffs' breach

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[9] ORCP 21A(8) is a defense that allows dismissal for "failure to state ultimate facts sufficient to constitute a claim. It is may be raised by a motion to dismiss or at the trial on the merits. ORCP 21A & G(3).

of contract claim was not a judgment on the merits. Plaintiffs voluntarily dismissed that claim, "irrevocably" choosing to forego that theory in favor of the alternative theory of negligence. The Court of Appeals left that judgment undisturbed. Sheets v. Knight, 308 Or. 220 (1989), abrogated on other grounds, McGanty v. Staudenraus, 321 Or. 532 (1995), supports the conclusion that claim preclusion does not apply as to Quinn. In that case, plaintiff brought several claims for relief. Two claims were dismissed with prejudice after adverse rulings by the trial court. 308 Or. at 224. Plaintiff moved to voluntarily dismiss the remaining claim without prejudice. Id. at 225-26. The Court stated that "res judicata would preclude this plaintiff from relitigating the first claim (voluntarily dismissed) in the event of an adverse ruling on the second claim in this appeal." Id. at 226. Plaintiffs prevailed in their appeal. Based on the preceding language and the similar posture in this case, it does not appear that Oregon courts would give preclusive effect to the judgment on the breach of contract claim in favor of Quinn. Thus, plaintiffs' RICO claims against Quinn are not barred by claim preclusion.

C. RICO Elements

18 U.S.C. § 1964(c) states:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fees. . . .

Plaintiffs bring claims under section 1962(a), (c) & (d). Subsection (a) states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Subsection (c] states: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

Subsection (d) proscribes any conspiracies to violate the subsections of section 1962.

Claims under subsection (a) require that plaintiffs be injured by use of or investment of the racketeering income. Nugget Hydroelectric, L.P. v. Pacific Gas and Elec. Co., 981 F.2d 429, 437 (9th Cir. 1992) , cert. denied, 508 U.S. 908 (1993). The Nugget Court rejected the argument that plaintiff's 1962(a) claim could go forward by alleging injury from the racketeering activity itself, rather than injury from the use or investment of the racketeering income. Id. "Liability under § 1962(c) requires (1) the conduct (2) of an

enterprise (3) through a pattern of (4) racketeering activity." Sun Savings and Loan Ass'n. v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987). Racketeering activity is any offense indictable under various provisions of Title 18. Id. Plaintiffs allege the predicate acts of mail and wire fraud.

1. Enterprise

RICO defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Plaintiffs allege an association-in-fact enterprise at paragraph 30-32 of their complaint made up of Quinn, the Bayshore defendants and other Central Oregon coast realtors. Quinn allegedly participated in the conduct of the enterprise by inspecting homes for potential buyers and sellers and failing to disclose known defects. Compl. at ¶ 31a.

Plaintiffs have provided no cases and the court has found none that establish RICO liability of an individual defendant. Likewise, the court has no law before it that prohibits a plaintiff from proceeding with RICO claims with an alleged enterprise consisting of previously dismissed defendants, when they were dismissed on defenses not reaching the merits of the RICO claims. Thus, the court will assume that an enterprise for purposes of RICO can consist of Quinn and the dismissed Bayshore defendants.

To establish a RICO violation, a plaintiff must show the defendant, in this case Quinn, "directly conduct[ed] or participate[d] in the enterprise's affairs through a pattern of racketeering activity." Sun Savings, 825 F.2d at 194. To

prove the existence of an association-in-fact enterprise, plaintiffs must show proof "(1) of an ongoing organization, formal or informal, and (2) that the various associates function as a continuing unit." Chang v. Chen, 80 F.3d 1293, 1297 (9th Cir. 1996).

In Chen, the Ninth Circuit adopted the majority interpretation of the enterprise element when it held "the organization, formal or informal, [must be] 'an entity separate and apart from the pattern of [racketeering] activity in which it engages.'" Id. at 1298 (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)). The Court went on to state:

> Under our interpretation of the enterprise element, the predicate acts of racketeering activity, by themselves, do not satisfy the RICO enterprise element. Although the evidence used to establish an enterprise and a pattern of racketeering activity may in particular cases coalesce, "the existence of an enterprise at all times remains a separate element which must be proved."

Id. at 1299 (quoting Turkette, 452 U.S. at 583). At a minimum to be an enterprise, there must be some structure for decision making purposes. Id.

In Chen, plaintiffs alleged they, and other buyers who were parties to the case, were defrauded by a land transaction scheme conducted by defendants. Id. at 1296. In concluding there was no enterprise, the Ninth Circuit found there was no "decision-making apparatus that limited or guided [defendants] in the performance of their respective duties.

Each [defendant] conducted his or her role in the alleged fraudulent real estate transaction autonomously." Id. at 1300. In this case, plaintiffs allege Quinn conducted faulty home inspections on plaintiffs' and other buyers homes after being referred by Bayshore or Comstock. However, the undisputed record before the court shows that taking plaintiffs' allegations as true, their claims have the same deficiencies that caused the Ninth circuit to adopt the majority approach to interpreting the enterprise element. Plaintiffs allegations show there was no enterprise separate and apart from the alleged pattern of racketeering activity. Because there was no RICO enterprise in this case, a necessary element for both subsections (a) and (c), Quinn's motion for summary judgment is granted as to the RICO claims. This conclusion also serves as an additional basis for granting summary judgment on plaintiffs' RICO claims in favor of the Bayshore defendants.

2. Pattern of Racketeering Activity

A "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). Racketeering activity includes the indictable offenses of mail and wire fraud. 18 U.S.C. § 1961(l).

The elements necessary to allege mail fraud under 18 U.S.C § 1341 are "(1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific

intent to deceive or defraud." Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F. 2d 1393, 1400 (9th Cir. 1986). Wire fraud has the same elements except the defendants must use or cause to be used the United States wires for communication. Id.

In H.J. Inc. v. Northwestern Bell Telephone Co., the Supreme Court determined the requirements for establishing a pattern of racketeering activity. 492 U.S. 229, 239-43 (1989). The Court stated that to prove a pattern of racketeering activity, a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." Id. at 239. Continuity may be shown by "proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." Id. at 242. Continuity may also be established by showing the predicate acts are attributable to a defendant who operates "as part of a long-term association that exists for criminal purposes," or the predicate acts are a regular way of conducting a legitimate ongoing business. Id. at 242-43.

The Ninth Circuit has further clarified the related and continuous requirements. Predicate offenses are related if they have "the same or similar purpose, results, participants, victims or methods of commission." Religious Technology Center v. Wollersheim, 971 F.2d 364, 366 (9th Cir. 1992) (internal quotations omitted). The Court used the terms "closed-ended continuity" and "open-ended continuity." Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1526 (9th Cir. 1995). Closed-ended continuity can be established by related predicates occurring over a "'substantial period of time.'" Id.

at 1527 (quoting H.J., 492 U.S. at 242). The Court also noted that continuity may be established by predicates are part of a one scheme.[10] Open-ended continuity is established by "past conduct that by its nature projects into the future threat of repetition" or by predicates that threaten repetition or become a regular way of doing business. Id. at 1528. The Court cautioned that "isolated or sporadic predicate acts" fail to satisfy the continuity requirement. Id. at 1529.

On the record before the court, plaintiffs cannot establish a pattern of racketeering activity. This case boils down to either one or several allegedly faulty home inspections by Quinn. Giving plaintiffs' evidence its most favorable interpretation, Quinn missed numerous defects in the home plaintiffs purchased and several other homes. This does not amount to a pattern and of racketeering activity. Furthermore, plaintiffs failed to offer any evidence that Quinn used either the United States mails or wires in conducting his inspections. There is evidence that one of the other alleged victims may have had their inspection mailed to them, but this is not sufficient. Plaintiffs attempt to establish a pattern by attaching a list of alleged predicate acts to their complaint.

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[10] The fact that a pattern of racketeering activity may be established by multiple predicates that are part of single scheme, undercuts plaintiffs argument that they could not allege their RICO claims at the time they sued defendants in state court. Plaintiffs attached a list of alleged predicate acts to their complaint. Most of those involve the purchase of Jensen's house. While expressing no opinion whether the predicate acts outlined in the complaint are sufficient, plaintiffs own allegations support the conclusion they could have alleged RICO claims when they filed their state court case.

However, plaintiffs cannot rest on their complaint in opposing summary judgement they must present credible evidence to create an issue of fact. Plaintiffs offer much evidence that supports their negligence claims against Quinn. However, RICO does not penalize repeated acts of negligence. It requires a pattern of racketeering activity. Plaintiffs have not shown the existence of a material issue of fact here and Quinn's motion for summary judgment on these claims is granted.

Because plaintiffs cannot satisfy the substantive RICO elements under subsection (a) and (c), the conspiracy claims under subsection (d) cannot stand. Religious Technology Center, 971 F.2d at 367 n. 8.

II. Plaintiffs' Motion for Partial Summary Judgment

Bayshore Realty and Comstock alleged three counterclaims against plaintiffs. Plaintiffs move for summary judgment on two of those claims: Intentional interference with business relations and Defamation-Slander Per Se.

BACKGROUND

The facts surrounding Bayshore and Comstock's counterclaims involves plaintiffs' dissatisfaction with the inspection by Quinn plaintiffs' beliefs about the connections between the defendants in the underlying RICO case. Defendants allege the underlying litigation, plaintiffs' statements about the litigation, the dissemination of a fact sheet, and a statement by plaintiffs' investigator support their counterclaims. Because most of facts pertaining to this

motion are disputed, the court will discuss the facts in relation to each claim.

I. Intentional Interference with Business Relations

The elements of a claim for interference with business or economic relations are: "(1) the existence of a valid business relationship or expectancy, (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to economic relations, and (6) damages." Uptown Heights Associates Ltd. Partnership v. Seafirst Corp., 320 Or. 638, 651 (1995). The Court stated:

> [I]n order to prevail, a plaintiff must establish "not only . . . that defendant intentionally interfered with his business relationship but also that defendant had a duty of non-interference; i.e., that he interfered for an improper purpose rather than a legitimate one, or that defendant used improper means which resulted in injury to plaintiff. Therefore, a case is made out which entitles plaintiff to go to a jury only when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself."

Id. (quoting Straube v. Larson, 287 Or. 357, 361 (1979).

"Either the pursuit of an improper objective of harming plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships

may give rise to a tort claim. . . ." Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 205 (1978). The Court also stated that common forms of improper means include "violence, threats or other intimidations, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." Id. at 210 n. 11. Additionally, damages from intentional interference must be of a kind that are a common and predictable result of interference with the relationship involved. Mooney v. Johnson Cattle Co., 291 Or. 709, 718 (1981). Emotional or mental distress damages are limited to the effect of dealing with the disruption to the underlying relationship. Id. at 719-20.

The Fesslers argue summary judgment is appropriate on defendants' counterclaims because defendants cannot prove damages and because all of the underlying facts relate to this litigation and are thus privileged. Defendants respond that they have been damaged by the allegedly unfounded litigation and the alleged slander of plaintiffs and their investigator. Defendants point to the fact that one employee allegedly quit because of the litigation and that Comstock was told Bayshore would not receive financing until the litigation was over. Geil aff. in support of SJ Mot. exh 1 at 8-10, 20-21(Comstock deposition). While it is a close issue, defendants' evidence on this counterclaim raises a question of fact. Because of the factual disputes listed above and because slander can be a basis for intentional interference, summary judgment is denied on this counterclaim.

II. Slander

To establish a claim for defamation, a plaintiff must show the defendant made a defamatory statement about plaintiff which is communicated or published to a third person. Downs v. Waremart Inc., 324 Or. 307, 311 (1996) (internal quotations omitted). Under Oregon law, the court "determines whether a communication is capable of a defamatory meaning." Beecher v. Montgomery Ward & Co., 267 Or. 496, 500 (1973). If the communication is capable of a defamatory meaning, it is a jury question whether the communication was understood by the recipient as defamatory. Id. If the communication is capable of a defamatory meaning and was so understood by the recipient, "damage is assumed although no special harm or loss of reputation results. . . ." Id. Defamatory communications are those that tend to "'harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" Id. at 499-500 (quoting 3 Restatement, Torts 140, § 559)).

In a slander action, plaintiff may recover only if special damages are specifically pleaded and proved. Cook v. Safeway Stores, Inc., 266 Or. 77, 82 (1973). However, there are some categories of spoken words that fall within the category of slander per se. Id. This category includes words that impute an unfitness to perform the duties of one's employment, commission of a crime "of major social disgrace," or if they prejudice the plaintiff in his or her profession. Id. In Cook, the Court stated that "[w]here words spoken are actionable Per se . . . damages to reputation are presumed. Where the words have been spoken in relation to employment or business, the law presumes damages to

employment or business reputation." Id. The Court also stated that plaintiff may allege a "general diminution of profits or decline of trade without naming particular customers or proving why they have ceased to do deal with him. . . ." Id. at 83 (quoting Newell, Slander and Libel 830 § 751 (4th ed 1924)).

Defendants allege the following communications as the basis for their claim:

> In Spring 1997, plaintiffs' investigator, Katy Maynard, contacted Carol Ann Milligan, a competitor of Bayshore and broker of Waldport Realty and asked if she had any trouble dealing with Comstock, if he was ethical and stated that there was a conspiracy between realtors and inspectors to defraud buyers; and
>
> On or about July 23, 1997, plaintiff Larry Fessler, contacted Lee Lyons, a competitor of Bayshore and broker of Sea Lion Realty; and told him he had filed racketeering charges against Comstock and that Comstock would be serving time in jail.

Def. Bayshore, Comstock's answer and counterclaims at 7-8.

Plaintiffs claim the statements at a issue are absolutely privileged because they relate to a judicial proceeding. Plaintiffs also allege that defendants must prove the statement false because the matters allegedly involve a matter of public concern. Plaintiffs have offered nothing more than conclusory statements that the statements at issue are matters

of public concern and this assertion is therefore rejected. Cooper v. Portland General Electric Corp., 110 Or.App. 581, 588 (rejecting claim of public concern where issue was purely private matter between private parties), review denied, 313 Or. 209 (1992).

Oregon law does recognize certain privileges. One is referred to as a public interest privilege. However, that privilege only applies if the statements were made to one who can act if the statements are true. Schafroth v. Baker, 276 Or. 39, 43 (1976). However, qualified privileges may be lost in a number of ways. Id. at 45. Some of the ways in which the privilege may be lost are as follows:

> [T]he publisher's lack of belief or reasonable grounds for belief in the truth of the defamatory matter; because the defamatory matter is published for some purpose other than that for which the particular privilege is given; because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege; or because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

Id (internal citations omitted) (quoting Restatement of Torts § 599). See also, Cooper, 110 Or.App. at 589-90. The court need not decide whether any privilege was abused her because the speech involved was not a matter of public concern.

A privilege exists under Oregon law for communications made by litigants in a judicial proceeding. Troutman v. Erlandson, 286 Or 3, 6 (1979). However, the privilege does not apply if the communication is made to someone "who has no direct connection with the judicial proceeding." Id. The allegedly defamatory communications in this case were made to two other realty agents in the Waldport area. Neither has direct connection with the judicial proceedings in this case. Thus, the plaintiffs are incorrect in asserting a privilege in those communications.

Before concluding that these claims may stand for trial, the substance of the statements themselves must be analyzed. "A factual statement need not be literally true in every detail in order to be protected from a defamation action; rather it is sufficient if the statement is substantially true." Hickey v. Capital Cities/ABC, Inc.,792 F.Supp. 1195, 1197 (D. Or. 1992), aff'd, 999 F.2d 543 (1993). A statement can be substantially true "if the gist of the statement is true, "even though the statement contains slight inaccuracies." Hickey v. Settlemier, 116 Or.App. 436, 440 (1992), aff'd in part, 318 Or. 196 (1993). In Hickey v. Capital cities/ABC, Judge Redden also stated that "[w]here there is no dispute of the underlying facts, the question of whether a statement is substantially accurate is one for the court." Id (citing Bahr v. Ettinger, 88 Or.App. 419, 422-23 (1987))[11]

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[11] Plaintiffs' argument that Mr. Fessler's expression was a matter of opinion and therefore not actionable is without merit because the statements were not a matter of pubic concern. 792 F.Supp. at 1199, (citing King v. Menolascino, 276 Or. 501 (1976). See also Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)).

The parties did not discuss in their memorandums the effect of the letter writing and fact sheet sent out by plaintiffs, although defendants cite to this in their concise statement. Lewis aff. exh. 1. Also, the parties dispute the facts surrounding the content of the statements made by Mr. Fessler and his investigator. Plaintiffs dispute the content of the statement involving whether Comstock was going to jail. Pl. SJ. Mem. at 7. Secondly, the deposition excerpt of Carol Milligan, attached to plaintiffs' concise statement, is not clear on what exactly was said to her, nor what she understood from that communication. There is an inference that plaintiffs' investigator may have said a conspiracy existed and was seeking information based on that conspiracy. Based on the less than complete record before the court summary judgment is not appropriate on defendants' counterclaims. Whether these claims will be sufficient at trial is a question for the fact-finder after a more completely developed record.

CONCLUSION

For the reasons stated above, defendants' motions (##69 & 73) for summary judgment ARE GRANTED IN PART and DENIED IN PART. Plaintiffs' motion (#74) for summary judgment IS DENIED. The parties also filed various objections and motions to strike portions of pleadings and supporting material in these cross motions. The court has reviewed all evidence in the light most favorable to the non-moving party, and thus, any such motions ARE DENIED.

Dated this 2nd day of October, 1998.

/s/_____

District Court Opinion and Order - 10/2/98

Dennis James Hubel
United States Magistrate Judge

Supreme Court, U.S.
FILED
JUN 07 2000
CLERK

(2)

No. 99-1973

In The

Supreme Court of the United States

LARRY FESSLER AND SUSAN FESSLER,

Petitioners,

v.

BAYSHORE REALTY, INC., an Oregon corporation; CORY COMSTOCK, an individual; JOHN C. JENSEN, an individual; and DAVID O. QUINN, an individual,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF DAVID O. QUINN

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OBJECTIONS TO QUESTIONS PRESENTED

Respondent Quinn objects to the petitioners' questions presented due to the fact that neither of the questions raised by petitioners were pressed or passed on below.

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ARGUMENT

The Petitioners arguments in support of their Petition for *Certiorari* can be broken down basically into three categories: (1) *Reves v. Ernst & Young*, 507 U.S. 170 (1993) was incorrectly decided; (2) *Reves* has caused too much confusion among the federal courts and its holding should be reconsidered and either be overruled or modified; and (3) the Court of Appeals was in error when it affirmed the district court's ruling regarding petitioners' RICO conspiracy claim. Respondent Quinn (hereinafter "Quinn") will address each of these arguments in turn.

A. *Reves* Was Correctly Decided.

In *Reves*, the question presented was "whether one must participate in the operation or management of the enterprise itself to be subject to liability under [18 USC 1962(c)]."[1] *Id.* at 172. In reaching its decision, the Court considered whether they should adopt the holding in *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983) (operation or management test) or follow the holding in *Bank of America National Trust & Savings Assn. v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986) (rejecting the requirement that a RICO defendant participate in the operation or management of an enterprise). In reaching its decision, the Court

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[1] 18 USC 1962(c) states: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

examined the language of 18 USC 1962(c), the legislative history of this provision and RICO's "liberal construction" clause. It is unclear what else petitioners think the Court should have considered.

Petitioners seem to imply that if the *Reves* Court had fully considered the "liberal construction" clause, they would have adopted the holding in *Bank of America* and rejected the "operation or management" test. However, the Court did consider the "liberal construction" clause when reaching its conclusion that in order to "participate directly or indirectly in the conduct of such enterprise's affairs" a defendant must have some part in directing those affairs. See *id.* at 183-84. In regards to the "liberal construction" clause, the Court stated:

> RICO's 'liberal construction' clause does not require rejection of the 'operation or management' test. * * * This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. This clause 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.' *Sedima, S.P.R.L. v. Imex Co.*, 473 U.S. 479, 492, n. 10 (1985).

Id. at 183.

The Court also examined, in some detail, the statutory language involved. It finally concluded that the word "conduct" requires some degree of direction and the word "participate" requires that a person have some

part in that direction. *Id.* at 179. Petitioners may disagree with this conclusion (Justice Souter and Justice White also disagreed) but that does not mean that the holding is therefore inherently flawed.

The *Reves* Court thoughtfully and articulately reached its ruling. Petitioners fail to point out any cogent reason why the ruling in *Reves* is incorrect. *Certiorari* should not be granted on this basis.

B. *Reves* Has Not Generated Inconsistent Rulings.

Petitioners cite numerous cases in support of their argument that *Reves* needs to be reconsidered because it has generated inconsistent results among the various circuit and district courts. It is true that in some cases the courts have ruled that a defendant has participated in the operation or management of an enterprise and in other cases the courts have ruled that a defendant has not participated in the operation or management of an enterprise. There is nothing inconsistent about this. Each court has simply looked at the facts in each case and made a ruling based upon the holding in *Reves*. In some cases, like this one, the facts do not support the allegation that a particular defendant participated in the operation or management of an enterprise. Petitioners do not appear to be claiming that the courts are applying various legal standards. Instead they appear to be saying that courts are applying the same legal standard to differing facts and coming up with differing conclusions. There is nothing wrong with that, and it is surely not sufficient enough reason to modify *Reves*, and it is certainly not

reason enough to grant petitioners' Petition for Writ of *Certiorari*.

Reves does not state that all organizations/corporations that supply professional services to a RICO enterprise are immune from suit. *Reves* simply holds that "in order to 'participate directly or indirectly in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." *Reves*, 507 U.S. at 179. Each court must then look at the particular facts in the case and determine if the defendant did in fact participate in the operation or management of an enterprise. There is nothing inconsistent about that. Accordingly, *Certiorari* should not be granted on the basis that *Reves* has generated inconsistent case law.

C. Petitioners Did Not Raise With The Court Of Appeals The Issue Of Their Perceived "Problems" With *Reves*.

Quinn fully briefed the issue of whether he participated in an enterprise in his response brief to the Court of Appeals. Petitioners did not raise their concerns about the holding in *Reves* in their reply brief; and accordingly, the Court of Appeals did not have an opportunity to address petitioners' concerns. Petitioners should not now be able to raise for the first time all their objections to the holding in *Reves*. *See*: *U.S. v. Williams*, 504 U.S. 36, 112 S. Ct. 1735, 118 L.Ed.2d 352 (1992) (Traditional Supreme Court practice precludes granting *certiorari* when question presented was not pressed or passed on below.) Because petitioners did not raise their objections to *Reves* below, Quinn was never provided with the opportunity

to respond to petitioners' concerns and the Court of Appeals was never provided with the chance to rule on their arguments. This is an additional reason for denying the Petition for *Certiorari*.

D. The Court Of Appeals Was Correct In Upholding The District Court's Granting Of Summary Judgment Against Petitioners On Their RICO Conspiracy Claim.

In affirming the district court's granting of summary judgment against petitioners on their RICO conspiracy claim, the Court of Appeals stated:

> There is no evidence in the record that Quinn agreed to do anything with the other defendants or, that he ever had any contact with them except during the inspection of Jensen's house. In the absence of any evidence that Quinn met with the other defendants, spoke to them on the telephone or had some other form of interaction with them, there is no basis to conclude that Quinn possibly could have conspired in the manner that Plaintiffs allege. Plaintiffs do not point to any evidence directly supporting this claim.

Appendix A, page 8, Petition for *Certiorari*.

Accordingly, it does not matter in this case whether *Reves* undermines *Salinas v. United States*, 522 U.S. 52 (1997) as the petitioners' claim. The Court of Appeals did not base their opinion that Quinn was not a conspirator on the fact that he failed to participate in the operation or

management of an enterprise. They held he did not conspire because there was no evidence to support petitioners' claim that he did conspire. Consequently, petitioners' second question presented is not even applicable to this case. It may be an appropriate question to be resolved in some other case, but it is not an appropriate question for this case.

E. Petitioners Did Not Raise With The Court Of Appeals The Issue Of Whether The District Court Was In Error When It Held That Their Conspiracy Claims Could Not Stand.

The petitioners submitted three issues for review to the Court of Appeals. The first issue dealt with Oregon law governing claim preclusion. The second and third issues were stated as follows:

> 2. Whether the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss the plaintiffs'-appellants' RICO claims on the ground that the plaintiffs-appellants failed to establish the necessary pattern element of a RICO claim (both substantive and conspiracy).
>
> 3. Whether the district court erred in granting the defendants' appellees' Motion for Summary Judgment to dismiss the plaintiffs'-appellants' RICO claims on the ground that the plaintiffs'-appellants failed to establish the necessary enterprise element of a RICO claim (both substantive and conspiracy).

Petitioners did not present a question regarding whether the district court was in error in holding

"because plaintiffs cannot satisfy the substantive RICO elements under subsection (a) and (c), the conspiracy claims under subsection (d) cannot stand." Appendix A, page 34a, Petition for *Certiorari*. In fact, petitioners did not raise this issue anywhere in their opening or reply briefs. See Appendix to this brief.

Petitioners are now raising for the first time in their Petition for *Certiorari* the issue of whether a conspiracy claim can survive if the substantive RICO claim does not. As with petitioners' issues with *Reves*, they cannot bring this issue up for the first time in the Petition for *Certiorari*. *See U.S. v. Williams*, 504 U.S. 36 (1992) (Traditional Supreme Court practice precludes granting *certiorari* when question presented was not pressed or passed on below.)

CONCLUSION

Basically petitioners want the Supreme Court to review findings of fact made by the Ninth Circuit Court of Appeals. They attempt to get around this by claiming that *Reves* is an incorrect statement of the law based on the reasoning behind RICO's "liberal construction" clause. The Supreme Court considered this clause when reaching its decision in *Reves* so petitioners' concerns are not well taken. Petitioners also did not raise the issue of the flaws in the *Reves* holding prior to their Petition. Accordingly, their question presented dealing with the need to clarify *Reves* should not be considered.

The Court of Appeals based their decision regarding petitioners' conspiracy claim on the fact there were no

facts to support petitioners' allegations that Quinn participated in a conspiracy. They did not base their decision on the fact that the underlying substantive RICO claim did not survive. Accordingly, petitioners' question presented regarding the conflict between *Reves* and *Salinas* should not be considered. An additional reason for not considering the second question presented is that this issue was neither pressed nor passed on below.

Dated this 7th day of July, 2000.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-35485

LARRY FESSLER and SUSAN FESSLER,

Plaintiffs-Appellants,

v.

BAYSHORE REALTY, INC. an Oregon corporation; CORY COMSTOCK, an individual; JOHN C. JENSEN, an individual; and DAVID O. QUINN, an individual,

Defendants-Appellees.

APPELLANTS' OPENING BRIEF

[Appeal from the United States District Court for the District of Oregon]

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I.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to

dismiss the plaintiffs'-appellants' RICO claims on the ground that this claim is barred under the doctrine of claim preclusion.

2. Whether the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss the plaintiffs'-appellants' RICO claims on the ground that the plaintiffs'-appellants failed to establish the necessary pattern element of a RICO claim (both substantive and conspiracy).

3. Whether the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss the plaintiffs'-appellants' RICO claims on the ground that the plaintiffs'-appellants failed to establish the necessary enterprise element of a RICO claim (both substantive and conspiracy).

II.

STATEMENT OF JURISDICTION

This appeal is taken from an Opinion and Order of the United States District Court for the District of Oregon entered on October 2, 1998 and a subsequent Judgment of Dismissal entered on April 23, 1999. The Judgment of Dismissal is a [sic] subject to appeal under 28 U.S.C. §1291, which provides that the courts of appeal have jurisdiction of appeals from all final decisions of the district courts of the United States.

Although the Judgment of Dismissal was voluntarily entered, it is "clear that plaintiffs may appeal from a voluntary dismissal with prejudice, at least where the plaintiff is not acting pursuant to a settlement agreement

intended to terminate the litigation." *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995), *cert. dismissed*, 517 U.S. 1183, 116 S.Ct. 1710, 134 L.Ed.2d 772 (1996).

The Notice of Appeal was filed on April 30, 1999. As a result, this appeal is timely under Federal Rule of Appellate Procedure 4(a)(1).

III.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997). Thus, the appellate court's review is governed by the same standard used by the district court under Federal Rule of Civil Procedure 56(c). *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997).

The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Covey*, 116 F.3d at 834. The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *Id.* Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 1127, 1130 (9th Cir. 1995). Moreover, where different ultimate inferences can be drawn from the evidence submitted by the moving party, summary judgment is inappropriate. *Sankokich v. Insurance Company of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

IV.

STATEMENT OF THE CASE

Plaintiff appellants Larry Fessler and Susan Fessler (the "Fesslers") appeal from an Opinion and Order of the United States District Court for the District of Oregon entered on October 2, 1998 (the "Order"). A Judgment of Dismissal of the case was subsequently entered on April 23, 1999. In the Order, the district court granted partial summary judgment in favor of defendants-appellees Bayshore Realty, Inc. ("Bayshore"), Cory Comstock ("Comstock"), John C. Jensen ("Jensen") (collectively, the "Bayshore Defendants"), and David O. Quinn ("Quinn") and denied partial summary judgment to the Fesslers' on Bayshore's and Comstock's second counterclaim for intentional interference with business relations and third counterclaim for defamation – slander per se.

The Fesslers commenced this action by filing their Complaint in the district court on October 23, 1996. Subsequently, this Complaint was superseded by a Second Amended Complaint on December 10, 1997, which was the operative pleading at the time summary judgment was granted by the district court. In the Second Amended Complaint, the Fesslers alleged eight claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against various or all of the defendants-appellees and one claim for negligence against Quinn alone.

On March 27, 1998, plaintiffs-appellants and defendants-appellees filed cross motions for summary judgment. The Bayshore Defendants filed their Motion for Summary Judgment as to the Fesslers' RICO claims

against them. Quinn filed his Motion for Summary Judgment as to the Fesslers' RICO claims and negligence claim against him.

On April 14, 1998, the Fesslers filed their Response to the Bayshore Defendants' and Quinn's Motions for Summary Judgment, Concise Statement of Material Facts in Opposition to the Bayshore Defendants' and Quinn's Motions for Summary Judgment, and supporting affidavits and exhibits.

On April 21, 1998, the Bayshore Defendants filed their Motion for Leave to File Supplemental, Extended and Corrected Concise Statement and Underlined Exhibits and the Affidavit of David C. Lewis in Support of Motion to Resubmit Underlined Exhibits.

On April 22, 1998, Quinn filed his Reply to Plaintiffs' Response to Motion for Summary Judgment and supporting affidavits and exhibits.

On April 27, 1998, the Fesslers filed their Amended Concise Statement of Material Facts in Opposition to the Defendants' Motions for Summary Judgment.

On April 29, 1998, the Bayshore Defendants filed their Reply to the Fessler's Response to Defendants' Summary Judgment Motions and Objections to the Fesslers' Concise Statement of Facts and Exhibits.

The district court heard oral argument on the parties' motions on May 13, 1998 and June 3, 1998. The May 13, 1998 hearing centered on oral argument regarding the Bayshore Defendants' Motion for Summary Judgment and Quinn's Motion for Summary Judgment. The June 3,

1998 hearing centered on the Fesslers' Motion for Partial Summary Judgment.

On May 26, 1998, each of the parties filed supplemental memoranda on the applicability of *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996) to the Fesslers' RICO enterprise element. These supplemental memoranda were submitted pursuant to the district court's order of May 13, 1998 requesting additional briefing on this issue.

On October 2, 1998, the district court entered an Opinion and Order granting in part and denying in part the Bayshore Defendants' and Quinn's Motions for Summary Judgment and denying the Fessler's Motion for Partial Summary Judgment.

Thereafter, the Fesslers moved the district court for an order to allow them to pursue an interlocutory appeal and staying proceedings while this appeal was pending. The district court denied this motion. Thereafter, stipulations and voluntary dismissals were filed by the parties. These stipulations expressly reserved the Fesslers' right to appeal the district court's grant of summary judgment on the RICO claims. The district court entered a Judgment of Dismissal on April 23, 1999. The Fesslers filed a Notice of Appeal on April 30, 1999.

V.

STATEMENT OF FACTS

This case arises out of the purchase and sale of real property located in Waldport, Oregon. In 1992, the Fesslers began looking for investment property in Oregon. Bayshore Defendants' Concise Statement of Material

Facts at p. 1, lns. 24-26. To help them find an appropriate property, the Fesslers contacted Cory Comstock, a real estate broker who owns and manages Bayshore Realty. *Id.* at p. 2, lns. 1-5.

In July of 1992, the Fesslers became aware that John Jensen's house located at 102 N.W. Oceania was up for sale. *Id.* at p. 2, lns. 12-13. Bayshore and Comstock had managed and rented out this home before it was purchased by the Fesslers and provided for and supervised ongoing maintenance and repair work for Jensen. Plaintiffs' Concise Statement of Material Facts at p. 17, ¶1.

Prior to the property closing, Larry Fessler asked Comstock to recommend a property inspector. Bayshore Defendants' Concise Statement of Material Facts at p. 4, lns. 21-23. Comstock recommended only one inspector: David Quinn, Plaintiffs' Concise Statement of Material Facts at p. 18, ¶5.

On October 30, 1992, Quinn performed the property inspection. Bayshore Defendants' Concise Statement of Material Facts at p. 5, lns. 2-3. After making his inspection, Quinn prepared a report. *Id.* at p. 5, lns. 17-19. The report does not mention the extensive 104 running feet of dry rot and pest infestation, nor the fact that thousands of pounds of sand was in the attic, nor the face-stapled wood shingles on the roof. Plaintiffs' Concise Statement of Material Facts at p. 19, ¶9. Because the Fesslers were unaware of the extensive damage to the property, they went through with the purchase of the property.

After learning of the concealed damage, the Fesslers filed a lawsuit on September 20, 1993 in Lincoln County Circuit Court alleging common law fraud against

Bayshore, Comstock, and Jensen and breach of contract and negligence claims against Quinn, Bayshore Defendants' Concise Statement of Material Facts at p. 7, lns. 2-7. On July 21, 1994, the court granted Bayshore, Comstock, and Jensen summary judgment. *Id.* at p. 7, lns. 7-9.

The Fesslers' attorney, Frederick Ronnau, and Comstock both stated under oath that they did not have any dealings or contact with each other. Plaintiffs' Concise Statement of Material Facts at p. 21, ¶15. However, phone records obtained in this case evidenced a telephone call from Comstock to Ronnau that was immediately followed by a facsimile from Comstock to Ronnau. *Id.* Comstock later admitted that he had a face-to-face meeting with Ronnau during the time in which the Fesslers' appeal rights on the summary judgment were still pending (which Ronnau advised the Fesslers not to contest). *Id.*

On February 8, 1995, the remaining claims against Quinn for breach of contract went to trial. However, after an off-the-record conference in chambers, the Fesslers, by and through their new attorney, Judith Selich, were forced to dismiss their claims based on the fact that the court denied their request for a continuance of trial based on the disappearance of their expert witness, David Norby, who would have testified that Quinn failed to meet the requisite standard of care in preparing his inspection report. *Id.* at p. 22, ¶¶17-18. Subsequently, the Oregon Court of Appeals reversed and remanded the trial court's dismissal of the Fesslers' negligence claim, and this negligence claim was subsequently consolidated with the federal court action. *See.* Order at p. 9; *Fessler v. Quinn,* 143 Or.App. 397, 403 (1996).

After the Oregon state court case was dismissed as to all defendants, the Fesslers learned, for the first time, that Quinn had inspected other houses in the area and had failed to disclose significant defects which would be expected to be disclosed. *Id.* at p. 22, ¶20. The Fesslers also learned of several other home sales by Bayshore and Comstock and inspected by Quinn involving patently defective property inspections. *Id.* at pp. 22-23, ¶¶21-27

VI.

SUMMARY OF ARGUMENT

In this appeal, the Fesslers contend that the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss their RICO claims.

First, the Fesslers contend that the district court erred in finding that the doctrine of claim preclusion barred their RICO claims because evidence presented to the court demonstrated that they were not aware of facts enabling them to state a RICO claim until after the previous Oregon state court case had been dismissed.

Second, the Fesslers contend that the district court erred in finding that they failed to establish the existence of a RICO enterprise because the district court adopted an improperly restrictive view of their evidence of the existence of an enterprise.

Third, the Fesslers contend that the district court erred in finding that they failed to establish a pattern of racketeering activity because the district court failed to give proper consideration to the evidence of continuous, related activity by the defendants-appellees.

VII.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE DOCTRINE OF CLAIM PRECLUSION DOES NOT BAR THE FESSLERS FROM BRINGING THEIR RICO CLAIMS IN THIS CASE

In the Order, the district court granted the Bayshore Defendants' Motion for Summary Judgment on the ground that the Fesslers' RICO claims were barred under the doctrine of claim preclusion, as that doctrine is interpreted under Oregon law. The Fesslers contend that the district court erred in reaching this determination because the evidence presented to the district court showed that the Fesslers could not establish the requisite elements of their RICO claims until after the prior Oregon state action was dismissed.

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

As the moving party herein, the Bayshore Defendants had the burden of establishing any defenses by admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden can be discharged by showing there is an absence of evidence to support the nonmoving party's case on any essential element. *Id.* The inquiry is whether a reasonable trier of fact could find, by a preponderance of the evidence, that the moving party is entitled to a

verdict as a matter of law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

The substantive law governing a claim determines whether a fact is material. *Anderson*, 477 U.S. at 248 (1986). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. *T.W. Elec. Service v. Pacific Elec. Contractors*, 890 F.2d 626, 630 (9th Cir. 1987). Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630-631. If direct evidence produced by the non-moving party contradicts direct evidence produced by the moving party, the court must assume the truth of the non-moving party's evidence with respect to that fact. *Id.* at 631.

In that part of its Order granting summary judgment in favor of the Bayshore Defendants, the district court found that the doctrine of claim preclusion, as applied under Oregon law, barred the Fesslers from bringing their RICO claims because "[u]nder Oregon law, plaintiffs could have and should have brought these claims in state court." Order at pp. 16-17. However, the evidence presented to the district court clearly indicates that in granting summary judgment on the basis of claim preclusion, the district court failed to give adequate consideration to evidence presented by the Fesslers that their RICO claim had not even arisen as of the time the Oregon state case had been dismissed.

"In determining whether a prior state court action bars a subsequent federal action, the federal court must look to the res judicata principles of the state court in which the judgment was rendered," *Pedrina v. Chun*, 97

F.3d 1296, 1301 (9th Cir. 1996), *citing Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 80 (1984), *cert. denied*, 117 S.Ct. 2441 (1997).

Under Oregon law, a plaintiff who has prosecuted one action against a defendant through to final judgment is precluded from prosecuting another action against the same defendant "where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action." *Drews v. EBI Companies*, 310 Or. 134, 140 (1990), *quoting Rennie v. Freeway Transport*, 294 Or. 319, 323 (1982). Because claim preclusion is an affirmative defense, the defendant bears the burden of pleading and proving facts necessary to establish the defense. *Troutman v. Erlandson*, 287 Or. 187, 213 (1979).

A RICO act arises when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1390 (9th Cir. 1990). To establish a RICO claim under Section 1962(c), the plaintiff must be aware of facts establishing (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *Sedima, S.P.L.R. v. Imrex Co., Inc.*, 473 U.S. 479 (1985); *Sun Savings and Loan Ass'n. v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987). RICO claims under Subsection (a) require that the plaintiff be injured by the use of or investment of racketeering income. *Nugget Hydroelectric, L.P. v. Pacific Gas and Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993). RICO conspiracy is proscribed under Subsection (d).

In granting the Bayshore Defendants' Motion for Summary Judgment, the district court erroneously assumed that the Fesslers' RICO claims were of such a nature as could have been joined in the first action. In reality, these RICO claims had not yet fully arisen as of the time the Oregon state court case was dismissed. In response to the Bayshore Defendants' Motion for Summary Judgment, the Fesslers presented the district court with evidence that they could not have brought their RICO claims against the Bayshore Defendants at the time the Oregon state court case was pending because they were not yet aware of the existence of other individuals who had similar experiences with the Bayshore Defendants. *See,* Plaintiffs' Amended Concise Statement of Material Facts at pp. 22-23, ¶¶19-27. Thus, the Fesslers could not have joined these RICO claims with the state law claims that were being litigated in that proceeding.

Had the Fesslers brought RICO claims against the Bayshore Defendants in the Oregon state court case without having first gained knowledge of facts showing the existence of a pattern of racketeering conduct on the part of the Bayshore Defendants, it is a virtual certainty that the Oregon state court and/or the Bayshore Defendants would have severely criticized the Fesslers for bringing such claims without having first verified that a good faith basis for these claims existed. As such, the fact that the Fesslers' only brought such claims after they had learned of facts allowing them to validly state such claims should not be grounds for preventing them from obtaining an adjudication of their rights with respect to the conduct alleged.

The district court also erred in finding that the Fesslers' RICO claims were based on the same factual transaction that was at issue in the Oregon state court case. While there is no dispute that both the district court case and the Oregon state court case center on the events surrounding the Fesslers' 1992 purchase of real property in Waldport, Oregon, the Fesslers' RICO claims alleged conduct by the Bayshore Defendants above and beyond this transaction and encompassed conduct directed at other individuals as well as conduct taking place during the Oregon state court case itself. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp. 20-22, ¶¶10-18; pp. 22-23, ¶¶19-27.

As a result, the district court's finding that the doctrine of claim preclusion bars the Fesslers from pursuing their RICO claims against the Bayshore Defendants in this action ignores the existence of evidence presented by the Fesslers showing that the Fesslers could not have brought these claims in the prior adjudication. At the very least, it is respectfully submitted that genuine issues of material fact exist as to whether the Fesslers had knowledge of sufficient facts that would have enabled them to state a RICO claim against the Bayshore Defendants while the Oregon state court case was pending.

On the one hand, the district court states that the Fesslers could and should have stated a RICO claim in the Oregon state court action because they could have stated such a claim at the time. Yet on the other hand, the district court holds (as shall be discussed below) that the Fesslers do not provide sufficient facts to state such a claim in the present case. Such inherent contradiction in the Order makes it clear that the district court's summary

judgment was improperly granted as to the Bayshore Defendants on the above grounds.

VIII.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE FESSLERS PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A RICO ENTERPPRISE

After granting summary judgment in favor of the Bayshore Defendants on the basis of claim preclusion, the district court granted partial summary judgment in favor of Quinn on the Fesslers' RICO claims against him on two main grounds. First, the district court found that the Fesslers failed to establish the existence of a RICO enterprise separate and distinct from the pattern of racketeering activity in which it engages.[1] Order at pp. 21-23. Second, the district court found that the Fesslers failed to establish the existence of a pattern of racketeering activity. Order at pp. 23-26. However, the district court erred in its application of the relevant law to the facts existing in this case. As a result, summary judgment on these bases was improper.

In discussing whether the Fesslers established the existence of a RICO enterprise, the district court relied in significant part on *Chang v. Chen*, 80 F.3d 1293 (9th Cir.

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[1] In the Order, the district court stated that in addition to serving as a basis for granting summary judgment in favor of Quinn, the Fesslers' failure to establish a RICO enterprise "also serves as an additional basis for granting summary judgment on plaintiffs' RICO claims in favor of the Bayshore defendants." Order at p. 23.

1996). Indeed, after the May 13, 1998 hearing on the defendants'-appellees' motions, the district court requested supplemental briefing on *Chang's* applicability to the issue before the court. However, by relying so heavily on *Chang*, the district court failed to give adequate consideration to other cases in this circuit directly on point with the Fesslers' case and instead adopted an unnecessarily restrictive view of what could constitute a cognizable RICO enterprise.

In *Chang*, the Ninth Circuit adopted "the majority interpretation of the enterprise element, which requires the organization, formal or informal, to be 'an entity separate and apart from the pattern of racketeering activity in which it engages.' " *Chang* at 80 F.3d at 1298, *quoting United States v. Turkette*, 452 U.S. 576, 583 (1981). Based on *Chang*, the district court held that "Plaintiffs allegations show there was no enterprise separate and apart from the alleged pattern of racketeering activity." Order at p. 23.

However, this finding ignores the Ninth Circuit's holdings in *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988), *Webster v. Omnitron Int'l.*, 79 F.3d 776 (9th Cir. 1996), and *United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988). In *Feldman*, which is specifically cited in *Chang* itself; the court held that involvement of a corporation which has an existence separate from its participation in the racketeering activity can satisfy the enterprise element's requirement of a separate structure. 853 F.2d at 660. Likewise, *Webster* holds that "[t]he participation of a corporation in a racketeering scheme is sufficient, of itself, to give the enterprise a structure apart from the racketeering activity: corporate entities have a legal existence separate and apart from their participation in the

racketeering, and the very existence of a corporation meets the requirements for a separate structure." 79 F.3d at 786. *See also, Kirk* at 844 F.2d at 664 ("[T]he existence of a corporation fulfills the requirements of an ascertainable structure apart from the predicate racketeering activity.").

In also bears mentioning that *Chang's* restrictive application has been subject to criticism by both courts and commentators. In one recent district court decision in the Southern District of California, *Dumas v. Major League Baseball Properties, Inc.*, 1999 WL 398042 (S.D.Cal. 1999), the court denied defendants' motions to dismiss the plaintiff's RICO claims, finding that the plaintiff had sufficiently pleaded a RICO enterprise and pattern.

In so doing, the court observed that:

> The rationale behind *Chang's* holding lay in a concern that, absent allegations of a separate entity with a decision making structure, §1962(c)'s "enterprise" element would be rendered superfluous. *Id.* at 1229. If *Chang* were the only case on this matter, the Licensors would appear to have a conclusive argument. However, the case law on this matter is not so simply categorized. Indeed, *Chang* itself is a peculiar case in that the court reaffirmed the Ninth Circuit's rule put forth in *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988), that "involvement of a corporation which has an existence separate from its participation in the racketeering activity can satisfy the enterprise element's requirement of a separate structure." *Chang*, 80 F.3d at 1300. However, *Chang* sidesteps this holding by finding that the corporation alleged to be part of the association-in-fact, "played no

> role whatsoever, legal or fraudulent, in the operations of the alleged enterprise," *Id.*, at 1301. Furthermore, *Chang* is a case in which the plaintiff apparently did not even include the corporation as a defendant.
>
> * * *
>
> Clearly, those are not the facts in the instant matter. Casting doubt on the utility of *Chang*, one treatise reads: "Unless the court overrules *Feldman*, it will be very easy for plaintiffs to avoid the same pleading mistake in the future. Thus, it remains to be seen whether *Chang* results in any significant tightening of the Ninth Circuit's definition of an association in fact." David B. Smith and Terrence C. Reed. *Civil RICO*, ¶3.06, p. 3-64 (Matthew Bender 1998).

Here, the Fesslers alleged that Bayshore Realty, an Oregon corporation, was an integral participant in the racketeering scheme. In opposition to the defendants'-appellees' motions for summary judgment, the Fesslers presented evidence that Bayshore Realty defrauded them and other victims by participating in a scheme whereby inspections that were required for home financing were done in a manner which covered up the full extent of hidden dry rot or pest damage to homes so that they could be sold to unwitting buyers for sale prices far greater than their actual value. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp. 17-20, ¶1-9. As a result, the facts of this case were very different from those of *Chang*, where the real estate company in question was not even a defendant, let alone a participant.

Because the district court failed to recognize that the Fesslers had properly alleged and proved a RICO enterprise separate and distinct from the racketeering activity itself, the district court's grant of summary judgment was improper. As a result, the district court's Order should be reversed.

IX.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE FESSLERS PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A RICO PATTERN

In addition to finding that the Fesslers failed to establish the existence of a RICO enterprise, the district court also found that they did not demonstrate that Quinn engaged in a pattern of racketeering activity. However, the district court's analysis of the pattern requirement rested on an unduly restricted interpretation of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Because of this, the district court erred in granting summary judgment on this ground as well.

In the Order, the district court characterized the Fesslers' evidence as only showing that "Quinn missed numerous defects in the home plaintiffs purchased and several other homes." Order at p. 25, However, the Order fails to note that the Fesslers also alleged that the Bayshore Defendants engaged Quinn to inspect properties they listed to sell them for a profit. *See*, Plaintiffs' Amended Concise Statement of Material Facts at p. 18, ¶5 and p. 23, ¶23. Thus, the Order rests on an incomplete view of the Fesslers' claims which is unnecessarily restrictive.

Moreover, the district court also failed to construe *Northwestern Bell* in a manner consistent with the liberal construction set forth in *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990) and other cases in this circuit. In *Ikuno*, the Ninth Circuit found that a pattern was created by the filing of two allegedly false annual reports. In so doing, the court stated:

> Although there is no talismatic number of predicate acts needed to establish a pattern, two acts is a minimum. *Northwestern Bell*, 109 S.Ct. at 2899. Li's actions thus could create a pattern because "Congress envisioned circumstances in which no more than two predicates would be necessary to establish a pattern of racketeering." *Id.*
>
> * * *
>
> His actions also carried with them the threat of continuity. He was filing annual reports and there is no evidence that he would have stopped doing so if KLCL had not ceased to do business.
>
> * * *
>
> Being mindful that "RICO is to be read broadly," *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), we hold that sufficient evidence of a pattern was alleged to withstand a motion for summary judgment.

912 F.2d at 309.

This broad interpretation of what constitutes a pattern of racketeering activity is also found in *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991). In *Ticor*, the court affirmed a RICO judgment against two defendants,

engaged in three episodes of forging federal tax lien releases as part of a real estate fraud scheme:

> The RICO judgment against Shepard and Florida was based on tree [sic] episodes of forgery. These forgeries were related under the Supreme Court test, because they had both similar purposes and identical methods of commission. [citation omitted]. The forgeries also posed a threat of continued criminal activity. Shepard and Florida forged the three releases within a 13-month period. The frequencies of the forgeries suggests that this practice had become a regular way of conducting business at Realty, satisfying the continuity prong of the pattern test. [citations omitted]. Shepard and Florida argue that there could not have been a threat of continued criminal activity, because they obtained two legitimate lien releases on other properties subsequent to the last forged release. However, that Shepard and Florida obtained two legitimate releases does not demonstrate that they would not continue to forged [sic] releases if legitimate attempts to obtain releases were unsuccessful. Thus, we conclude that the district court was correct in holding that the three forgeries demonstrated a pattern of racketeering under RICO. *Id.* at 450-451.

Given the above, it is clear that the district court's application of *Northwestern Bell* to the facts of this case represented an unnecessarily restrictive approach to determining whether a pattern of racketeering activity existed. Because the district court adopted such a narrow approach, it failed to properly credit the Fesslers with

having established a pattern defeating summary judgment. As such, the district court's grant of summary judgment in favor of Quinn should be reversed.

X.

CONCLUSION

For all the foregoing reasons, the Fesslers respectfully submit that the record before the Court clearly demonstrates that the district court erred in granting summary judgment in favor of the defendants-appellees on the Fesslers' RICO claims. Pursuant thereto, the Fesslers respectfully request that the district court's Order be reversed.

DATED: September 3, 1999

MARKS & BROOKLIER

/s/ Donald B. Marks
DONALD B. MARKS
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STATEMENT OF RELATED CASES

The plaintiffs-appellants are not aware of any related cases pending before this Court.

MARKS & BROOKLIER

/s/ Donald B. Marks
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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32(e)(4)

I, DONALD B. MARKS, certify that pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 5760 words.

Executed on this 3rd day of September, 1999 at Los Angeles, California,

MARKS & BROOKLIER

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, 12th Floor, Los Angeles, California 90067.

On September 3, 1999, I served the foregoing document described as **APPELLANT'S OPENING BRIEF** on all parties in this action by placing the true copies thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully paid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

___ BY PERSONAL SERVICE

I caused such envelope to be delivered by hand to the offices of the addressee.

___ BY FAX

I caused such document to be transmitted via fax to the offices of the addressee.

___ STATE I declare, under penalty of perjury, under the laws of the State of California that the above is true and correct.

___ FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED on September 3, 1999 at Los Angeles, California.

/s/ Harold E. Frazier, Jr.
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35485

LARRY FESSLER and SUSAN FESSLER,

Plaintiffs-Appellants,

v.

BAYSHORE REALTY, INC. an Oregon corporation; CORY COMSTOCK, an individual; JOHN C. JENSEN, an individual; and DAVID O. QUINN, an individual,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF

[Appeal from the United States District Court
for the District of Oregon]

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I.

INTRODUCTION

In their Answering Briefs, defendants-appellees Bayshore Realty, Inc. ("Bayshore"), Cory Comstock ("Comstock"), John C. Jensen ("Jensen") (collectively, the "Bayshore Defendants"), and David O. Quinn ("Quinn") attempt to refute plaintiffs-appellants Larry D. Fessler's and Susan D. Fessler's (collectively, the "Fesslers") arguments in favor of reversal of the District Court's grant of their motions for summary judgment by pointing to items in the record that they contend support their version of the facts. However, by arguing the facts, the Bayshore Defendants and Quinn actually show why triable issues of material fact exist and why summary judgment should have been denied.

Given the state of the record before this Court, and given the fact that compelling evidence exists supporting the Fesslers' claims (which may or may not be contradicted by other evidence presented by the defendants-appellees), it is readily apparent that summary judgment was improperly granted in this case. Accordingly, the District Court's order granted [sic] summary judgment should be reversed, and the Fesslers should be given the opportunity to proceed to a trial on the merits on their claims.

II.

THE BAYSHORE DEFENDANTS FAIL TO PRESENT THE COURT WITH A VALID BASIS UPON WHICH THE FESSLERS' EVIDENCE IN SUPPORT OF THEIR CLAIMS SHOULD BE IGNORED

The Bayshore Defendants devote a significant portion of their Answering Briefs pointing out evidence in the record before the Court supporting their position that the Fesslers were precluded from pursuing their RICO claims against them and that the Fesslers cannot establish the elements of their RICO claims. However, the appellees completely ignore other evidence also in the record rebutting their position and supporting the Fesslers claims. The existence of evidence both for and against the Fesslers' claims only highlights the fact that triable issues of material fact remain to be determined by the trier of fact and mandates that summary judgment be denied.

As mentioned in the Appellants' Opening Brief, the District Court's grant of summary judgment is reviewed *de novo. Covey v. Hollydale Mobilehome Estates,* 116 F.3d 830, 834 (9th Cir. 1997). Thus, in reviewing this record, this Court must view the evidence in the same manner that the District Court is obligated to do: *in the light most favorable to the nonmoving party. Id.* at 834 (italics added). The court must not weigh the evidence or determine the truth of the matter; instead, it must only determine whether there is a genuine issue for trial. *Id.*

In this appeal, the Fesslers contend that the District Court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss their RICO

claims for three main reasons. First, the Fesslers contend that the District Court erred in finding that the doctrine of claim preclusion barred their RICO claims. Second, the Fesslers contend that the District Court erred in finding that they failed to establish the existence of a RICO enterprise because it adopted an improperly restrictive view of their evidence of the existence of an enterprise. Third, the Fesslers contend that the District Court erred in finding that they failed to establish a pattern of racketeering activity.

Each of these arguments are supported by specific evidence that was presented to the District Court, but not properly considered by it, in connection with the motion for summary judgment. Thus, the appellees' factual arguments notwithstanding, it is clear that the presence of highly material, compelling evidence in support of the Fesslers' position compelled the District Court, and should compel this Court, to deny summary judgment.

These citations to the record are discussed at some length in the Appellants' Opening Brief and need not be repeated in full here. However, because the Bayshore Defendants and Quinn have chosen to utterly ignore their presence, a brief discussion of these matters is appropriate.

In their Answering Brief, the Bayshore Defendants contend that no evidence before the District Court supported the Fesslers' arguments against the application of the doctrine of claim preclusion in this case. However, in response to the Bayshore Defendants' Motion for Summary Judgment, the Fesslers presented the District Court with evidence that they could not have brought their

RICO claims against the Bayshore Defendants at the time the Oregon state court case was pending because they were not yet aware of the existence of other individuals who had similar experiences with the Bayshore Defendants. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp. 22-23, ¶¶ 19-27. The Fesslers also presented the District Court with evidence that their RICO claims were not only based on the events surrounding their 1992 purchase of real property in Waldport, Oregon, but also on conduct by the Bayshore Defendants above and beyond this transaction directed at both themselves and other individuals up through the conclusion of the Oregon state court case itself. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp 20-22, ¶¶ 10-18; pp. 22-23, ¶¶ 19-27.

In granting summary judgment, the District Court appears to have ignored these facts or else erroneously made credibility determinations in disregarding them. In their Answering Brief, the Bayshore Defendants essentially repeat this error by arguing that certain general statements made by Mr. Fessler during his deposition and/or documents produced during discovery constitute "admissions" of his knowledge of the viability of RICO claims during the time the Oregon state court action was pending. However, a review of these statements and documents, in their proper context, reveals that the Bayshore Defendants' contentions are based on a mischaracterization of the actual facts.

For example, the Bayshore Defendants argue that "[d]espite plaintiffs' belief beginning as early as April 1993 that defendant[s] were involved in a conspiracy, plaintiffs chose not to bring the conspiracy, in the form of

a RICO claim or otherwise, to the court's attention at any time during the pendency of the state case." Bayshore Defendants' Answering Brief at p. 34. However, the actual evidence relied upon demonstrates no such thing. Instead, this evidence, consisting of highly generalized statements made by Mr. Fessler in his deposition and a written narrative prepared by Mrs. Fessler, only demonstrates that the Fesslers believed that some form of wrongdoing involving the appellees had occurred. It does not show that the Fesslers, or their attorney at the time, had knowledge of specific facts sufficient for them to have alleged a RICO conspiracy claim.

It also misapprehends the fact that RICO conspiracy differs from "ordinary" conspiracy in that the conspiracy required to be alleged is one to conspire to engage in a pattern of racketeering activity rather than simply conspiring to commit a bad act, which need not be part of a "pattern" nor "racketeering activity". Thus, even if one assumes, *arguendo*, that sufficient evidence existed for the Fesslers to have alleged a conspiracy claim in their Oregon state court case (which, given the evidence, is not true in any event), this does not equate to having sufficient knowledge to allege a RICO conspiracy claim. Thus, the appellees' argument is meritless.

As the moving party herein, the Bayshore Defendants had the burden of establishing any defenses by admissible evidence. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To meet this burden, the Bayshore Defendants were required to show the *absence* of evidence to support the nonmoving party's case on any essential element. *Id.* (italics added). Because the Fesslers presented the District Court with direct factual evidence supporting their

claims, the Bayshore Defendants could not meet this burden as a matter of law. The Bayshore Defendants only prevailed because the District Court improperly weighed the evidence and failed to resolve doubts as to the existence of a material factual issue against the moving party. As a result, the District Court's order must be reversed.

III.

QUINN FAILS TO PRESENT THE COURT WITH A VALID BASIS UPON WHICH THE FESSLERS' EVIDENCE IN SUPPORT OF THEIR CLAIMS SHOULD BE IGNORED

Like the Bayshore Defendants, Quinn's Answering Brief is primarily centered on pointing out portions of the factual record supporting his defenses to the Fesslers' RICO claims. However, like the Bayshore Defendants' arguments, Quinn's arguments are easily rebutted by the presence of other evidence supporting them.

In the Order granting summary judgment, the District Court characterized the Fesslers' evidence as only showing that "Quinn missed numerous defects in the home plaintiffs purchased and several other homes." Order at p. 25. However, the Order failed to note that the Fesslers also alleged that the Bayshore Defendants engaged Quinn to inspect properties they listed to sell for a profit. *See*, Plaintiffs' Amended Concise Statement of Material Facts at p. 18, ¶ 5 and p. 23, ¶ 23. Thus, the Order rests on an incomplete view of the Fesslers' claims.

Such a view also necessarily implies construing evidence in a manner *least*, rather than most, favorable to the

Fesslers. Under well-established summary judgment doctrine, such a presumption is incorrect as a matter of law.

Such a view is also contradicted by the law in this circuit, such as *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990), *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991), where this Court found that a RICO pattern was created by the filing of two allegedly false annual reports and three episodes of forging federal tax lien releases as part of a real estate fraud scheme, respectively.

Given the above, it is clear that the District Court adopted an unnecessarily narrow approach to this issue and failed to properly credit the Fesslers with having established a pattern defeating summary judgment.

The Answering Briefs of both the Bayshore Defendants and Quinn also fail to adequately address legal authority raised by the Fesslers that refutes the legal authority relied upon by them in their moving papers regarding the enterprise element of the Fesslers' RICO claims. A great deal of emphasis is placed by the appellees (as it was by the District Court) on *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996), which is treated by both the Bayshore Defendants and Quinn as well-settled law in this circuit. However, it is clearly not.

In *Chang*, the Ninth Circuit adopted "the majority interpretation of the enterprise element, which requires the organization, formal or informal, to be 'an entity separate and apart from the pattern of racketeering activity in which it engages.' " *Chang* at 80 F.3d at 1298, *quoting United States v. Turkette*, 452 U.S. 576, 583 (1981). Based on *Chang*, the district court held that "Plaintiffs allegations show there was no enterprise separate and apart from the alleged pattern of racketeering activity." Order at p. 23.

However, this finding ignores this Court's holdings in *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988), *Webster v. Omnitron Int'l.*, 79 F.3d 776 (9th Cir. 1996), and *United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988). In *Feldman*, which is specifically cited in *Chang* itself, the court held that involvement of a corporation which has an existence separate from its participation in the racketeering activity can satisfy the enterprise element's requirement of a separate structure. 853 F.2d at 660. Likewise, *Webster* holds that "[t]he participation of a corporation in a racketeering scheme is sufficient, of itself, to give the enterprise a structure apart from the racketeering activity: corporate entities have a legal existence separate and apart from their participation in the racketeering, and the very existence of a corporation meets the requirements for a separate structure." 79 F.3d at 786. *See also, Kirk* at 844 F.2d at 664 ("[T]he existence of a corporation fulfills the requirements of an ascertainable structure apart from the predicate racketeering activity.").

In this action, the Fesslers alleged that Bayshore Realty, an Oregon corporation, was an integral participant in the racketeering scheme. In opposition to the defendants'-appellees' motions for summary judgment, the Fesslers presented evidence that Bayshore Realty defrauded them and other victims by participating in a scheme whereby inspections that were required for home financing were done in a manner which covered up the full extent of hidden dry rot or pest damage to homes so that they could be sold to unwitting buyers for sale prices far greater than their actual value. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp. 17-20, ¶¶ 1-9. As a result, the facts of this case are very

different from those of *Chang*, where the real estate company in question was not even a defendant, let alone a participant.

Feldman, *Webster*, and *Kirk* remain good law in this circuit and appear to have greater applicability to the facts of the instant case. As such, the appellees' attempt to characterize *Chang* as the first and last word on the issue of enterprise is wholly disingenuous. This Court need not, and should not, defer to *Chang*'s strongly criticized holding. Instead, this Court should find that the rationales of *Feldman*, *Webster*, and *Kirk* are appropriate here and reverse the District Court's grant of summary judgment on this basis as well.

IV.

CONCLUSION

For all the foregoing reasons, the Fesslers respectfully submit that the record before the Court clearly demonstrates that the district court erred in granting summary judgment in favor of the defendants-appellees on the Fesslers' RICO claims. Pursuant thereto, the Fesslers respectfully request that the District Court's Order be reversed.

DATED: November 19, 1999

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Susan Fessler

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32(e)(4)

I, DONALD B. MARKS, certify that pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 32-I, the attached Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 2538 words.

Executed on this 19th day of November, 1999 at Los Angeles, California.

/s/ Donald B. Marks
DONALD B. MARKS
Attorney for
Plaintiffs-Appellants
Larry Fessler and Susan
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PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, Suite 1200, Los Angeles, California 90067.

On November 19, 1999, I served the foregoing document described as

APPELLANT'S REPLY BRIEF on all parties in this action by placing the true copies thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

X BY MAIL

I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid – I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully paid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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X FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED on November 19, 1999, at Los Angeles, California.

/s/ Harold E. Frazier
HAROLD E. FRAZIER, JR.

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Supreme Court, U.S.
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(3)

No. 99-1973

IN THE
SUPREME COURT OF THE UNITED STATES

Larry M. Fessler and Suzanne D. Fessler,
Petitioners,

v.

Bayshore Realty Inc., an Oregon corporation,
Cory Comstock, John C. Jensen, and David O. Quinn,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, BAYSHORE REALTY INC., CORY COMSTOCK, and JOHN C. JENSEN

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SUMMARY OF ARGUMENT

Petitioners' federal RICO claims against Bayshore Realty Inc., Cory Comstock, and John C. Jensen ("the Bayshore defendants") are barred by the claim preclusion doctrine, as the Court of Appeals held. Given that an independent state law ground exists for affirming the decision of the Court of Appeals, this Court would be unable to reach the federal law questions which petitioners present. Accordingly, the writ for *certiorari* should be denied with respect to the Bayshore defendants.

ARGUMENT

Petitioners here urge this Court to grant *certiorari* in order to provide "judicial guidance" regarding the application of Reves v. Ernst & Young, 507 U.S. 170 (1993) with respect to RICO § 1962(d) claims. In particular, petitioners assert that the Court of Appeals' interpretation of Reves with respect to the RICO elements undermines this Court's decision in Salinas v. United States, 522 U.S. 52 (1997). In addition, petitioners claim that the construction of Reves by the federal courts overall requires uniformity and clarification.

A writ of *certiorari* is inappropriate in this case because there is a dispositive, independent state law ground—claim preclusion—which would prevent this Court from even addressing the federal law issues which petitioners raise. Accordingly, this court should deny the petition for writ of *certiorari*.

Under Oregon law, as in most states, the doctrine of claim preclusion prevents a plaintiff who has prosecuted an action against a defendant to a final judgment from bringing a subsequent action against the same defendant based upon the same transaction underlying the first action. Drews v. EBI Companies, 310 Or. 134, 140, 795

P.2d 531, 535 (1990). Claim preclusion requires four elements: (1) final judgment in first action; (2) claim in second action is based on the same factual transaction at issue in the first action; (3) second action seeks a remedy in addition or alternative to the one sought in the first action; and (4) the claim in the second action is of such a nature as could have been joined in the first action. Drews, 310 Or. at 140, 795 P.2d at 535. Oregon courts employ a "broad definition" of what could have been litigated. Drews, 310 Or. at 141, 795 P.2d at 536. The principle purposes of claim preclusion are the prevention of harassment of defendants by successive legal proceedings and the economy of judicial

resources. Rennie v. Freeway Transport, 294 Or. 319, 327, 656 P.2d 919, 924 (1982).

As both the District Court and the Court of Appeals readily concluded, this action against the Bayshore defendants is barred on claim preclusion grounds. Indeed, it is undisputed that on or about September 20, 1993, petitioners filed a state court fraud action against the Bayshore defendants and Quinn in Lincoln County Circuit Court, Oregon. Petitioners alleged that defendants failed to disclose and/or actively concealed fungi and dry rot damages in connection with the Waldport, Oregon property that petitioners had purchased. After full briefing and oral argument, the state court granted

summary judgment in favor of the Bayshore defendants. Although petitioners filed a Notice of Appeal on May 5, 1995, plaintiffs on July 5, 1995 elected to dismiss their appeal against the Bayshore defendants. Petitioners thereafter proceeded to trial, then appealed the judgment in favor of Quinn. See Fessler v. Quinn, 143 Or. App. 397, 923 P.2d 1294 (1996). Finally, petitioners moved for and were denied relief from judgment on November 14, 1995.

Despite this extensive litigation in state court, petitioners thereafter on October 26, 1996 instituted this action in federal court alleging violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C.

§§ 1961-1968. The only difference between this action and the state court action was petitioners' inclusion of allegations of "conspiracy" and "scheme to defraud." These allegations, however, did not create a new "factual transaction" sufficient to render the claim preclusion doctrine inapplicable. Despite the reference to the other "victims" and the conspiracy, petitioners' focus in both the state court action and this action was the Bayshore defendants' and Quinn's alleged fraud in petitioners' purchase of the Waldport property. Under the circumstances, the District Court and the Court of Appeals properly found that this action was barred by the claim preclusion doctrine.

CONCLUSION

As the District Court and the Court of Appeals readily found, petitioners' claim against the Bayshore defendants are barred by state claim preclusion law. Notably, petitioners do not argue in their Petition for Writ of *Certiorari* that the Court of Appeals erroneously found that the claim preclusion doctrine barred this action against the Bayshore defendants. Given the independent state law ground which would preclude this Court from addressing the federal law issues relating to

RICO, this Court should deny *certiorari*. In any event, there is no compelling reason warranting this Court's review.

Dated: July 7, 2000

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29, Bayshore Realty, Inc. has no parent corporation. Nor does any publicly held company own 10% or more of its stock.

Dated: July 7, 2000

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